Petition

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No. 81-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CARLOS CHARDON and OSCAR RAMOS, *Petitioners,*

v.

RAFAEL RIVERA FERNANDEZ, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether, for purposes of determining when the statute of limitations begins to run, a cause of action under 42 U.S.C. §1983 alleging a discriminatory decision not to reappoint an employee to a non-permanent position accrues at the time the employee is notified of such non-reappointment.

PARTIES TO THE PROCEEDING

The Petitioners are Carlos Chardon, Secretary of Public Education of the Commonwealth of Puerto Rico, and Oscar Ramos, Assistant Secretary in charge of Personnel of Public Education of the Commonwealth of Puerto Rico.

The respondents whose cases were decided by the United States Court of Appeals for the First Circuit in *Rafael Rivera Fernandez* v. *Carlos Chardon, et al.*, 648 F.2d 765 (1st Cir. 1981) are:

No. 80-1237, Rafael Rivera Fernandez
No. 80-1238, Angel L. Arzon Mendez
No. 80-1245, Ramon A. Vega Cruz
No. 80-1247, Laura L. Santos Roa
No. 80-1249, Angel Luis Allende
No. 80-1339, Evelyn Irizarry Escobar
No. 80-1340, Enrique Diaz Maldonado
No. 80-1341, Jose D. Nieves Rivera
No. 80-1342, Aida L. Sanchez de Negron
No. 80-1343, Herminia A. Ortiz-Ortiz
No. 80-1344, Jose R. Munoz Rivera
No. 80-1345, Eduardo Tarafa Gonzalez
No. 80-1392, Gladys Rosado Acevedo
No. 80-1402, Roberto Velazquez Nieves
No. 80-1404, Sara Velazquez Concepcion
No. 80-1506, Cecilio Alvarez Plajas
No. 80-1507, Enrique Rosado Alverio

No. 80-1508, Julia Martinez Vda de Calderon
No. 80-1509, Saquia Azize-Mawad
No. 80-1510, Isaias Torres Sanchez
No. 80-1511, Miguel Alvelo Rodriguez
No. 80-1512, Irma I. Baldoni de Valencia
No. 80-1513, Manuel Rosas Lebron

The respondents whose cases were decided by the United States Court of Appeals for the First Circuit in separate, identical judgments entered on June 11, 1981 are:

No. 80-1649, Caspar Rodriguez Rodriguez
No. 80-1838, Aida E. Santiago de Orta
No. 80-1839, Yolanda Angiuta de Rios
No. 80-1840, Jose M. Rosado Sanchez
No. 80-1844, Wilfredo Cintron Santana
No. 80-1848, Ramon A. Perez-Ramirez
No. 81-1001, Carmen Roman de Molina
No. 81-1002, Blanca Cacho Collazo
No. 81-1003, Pahita Guadalupe Garcia
No. 81-1004, Aida Lopez de Ferra
No. 81-1006, Carlos Cruz Beltran
No. 81-1008, Fanny Cacho de Freytes
No. 81-1194, Claudio Aviles Navarro

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-_____

CARLOS CHARDON and OSCAR RAMOS, *Petitioners,*

v.

RAFAEL RIVERA FERNANDEZ, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners, Carlos Chardon and Oscar Ramos, respectfully pray that a writ of certiorari be issued to review the separate but related judgments of the United States Court of Appeals for the First Circuit entered on May 8, 1981 and June 11, 1981. Identical issues are involved in these separate judgments of the First Circuit.

OPINIONS BELOW

The opinion of the court below, reported at 648 F.2d 765 (lst Cir. 1981), which decided the cases of twenty-three respondents is reproduced in its entirety as Appendix A, *infra*, 1a-10a. The text of the identical unreported judgments entered by the court below on June 11, 1981, also appears in Appendix A, *infra*, 11a-12a. The orders of the United States District Court for the District of Puerto Rico, which were reviewed by the court below, are reproduced as Appendix B, *infra*, 13a-64a. Only two of the District Court orders have been reported. *Velazquez* v. *Chardon*, 500 F.Supp. 10 (D.P.R. 1980) and *Navaro* v. *Chardon*, 506 F.Supp. 229 (D.P.R. 1980).

JURISDICTION

The separate but related judgments of the court below were entered on May 8, 1981 and June 11, 1981 and involve the identical question. This Petition for Certiorari was filed within ninety days of the May 8, 1981 judgment date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 5298 of Title 31 of the Laws of Puerto Rico Annotated (hereinafter "L.P.R.A.") and 42 U.S.C. §1983 are set forth in Appendix C, *infra*, 65a.

STATEMENT OF THE CASE

The petitioners in this action are Carlos Chardon and Oscar Ramos, the Secretary, and the Personnel Director, respectively, of the Department of Education of the Commonwealth of Puerto Rico. Each of the

thirty-six respondents was appointed to a non-permanent, non-tenured administrative position in the Department for the 1976-1977 school year.[1] Between June 2, 1977, and June 17, 1977, the Department notified each respondent that he or she would not be reappointed to the non-permanent position in the 1977-1978 school year.[2] Thirty-three of the respondents were told that they would be reinstated to the tenured positions they had previously held as teachers or lower level administrators. The other three respondents, who had not previously held tenured positions, were told that their employment with the Department would cease. The respondents replied by individual letters to the petitioners stating that they would comply but that they disagreed with the decision to let the appointments expire and would refer the matter to the Puerto Rico Teachers Association.[3]

On June 19, 1978, Jose Ortiz Rivera filed a purported class action against the petitioners in the United States District Court for the District of Puerto Rico. Ortiz Rivera (not a respondent herein, his suit having been filed within one year after he received notice) claimed that the Department of Education had failed to reappoint him because of his political affiliation and that his rights under the First and Fourteenth Amendments to the United States Constitution were thus violated. His suit sought relief under 42 U.S.C. §1983 claiming

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[1] An example of the letter of appointment sent to respondents appears in Appendix D, *infra*, 67a.

[2] Each of the thirty-six letters indicated a date, between June 30 and August 8, 1977, when the non-permanent appointment would expire. An example of the letter received by the respondents appears in Appendix E, *infra*, 69a.

[3] An example of the letter sent by the respondents to the petitioners appears in Appendix F, *infra*, 71a.

jurisdiction in the District Court of Puerto Rico under 28 U.S.C.A. §§1331, 1343(3), (4), 2201 and 2202. Class certification was denied and thereafter each of the thirty-six respondents in the instant cases filed separate complaints, each making essentially the same claims. The district court dismissed all thirty-six complaints finding that the actions were barred by the Puerto Rican one-year statute of limitations (31 L.P.R.A., §5298(2)) applicable to §1983 actions.

On appeal to the United States Court of Appeals for the First Circuit, the parties agreed that 31 L.P.R.A. §5298(2) was the applicable statute of limitations and that the present actions were commenced, for limitations purposes, on June 19, 1978, when Ortiz Rivera filed his complaint. 648 F.2d at 766. The court below held that the causes of action were not time-barred because they had accrued on the effective date of the respondents' change in status, not on the earlier date when respondents had been notified in writing that they would not be reappointed for the 1977-1978 school year. The judgments of the district court were vacated and the cases were remanded for further proceedings.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Fails To Follow A Recent Decision Of This Court.

In *Delaware State College* v. *Ricks*, 449 U.S. _____, 101 S.Ct. 498 (1980), this Court considered and decided the proper point of accrual for a cause of action based on an allegedly discriminatory denial of tenure to a college professor, Ricks. This Court found that Ricks' claims under Title VII and 42 U.S.C. §1981 accrued when the tenure decision was made and Ricks was notified that he would be offered a "terminal" contract

for the next school year, and not at the later date when the effects of this tenure decision were realized.

The facts of the instant cases are, in all pertinent aspects, substantially similar to the facts of the *Ricks* case. The denial of reappointment to a non-permanent position is closely analogous, if not virtually identical, to a denial of tenure. Thus, here as in *Ricks*, the focus properly should be on the date of notification and not upon the effective date of the respondents' change in status. "The proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences become most painful." *Abramson* v. *University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979), cited with approval in *Ricks*, 449 U.S. at _____, 101 S.Ct. at 504.

The contrary holding of the court below that the cause of action accrued on the effective date of the respondents' change in status rests upon a rationale expressly rejected by this Court in *Ricks*. First, this Court rejected the rationale that the accrual of an employee's cause of action is delayed because the employee continues to work at his or her job. "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Ricks*, 449 U.S. at _____, 101 S.Ct. at 504. Second, this Court rejected the "bright line" theory, that a cause of action accrues on the last day of employment simply because that date is easily ascertainable. 449 U.S. at _____, 101 S.Ct. at 503.

In the instant cases, however, the court below failed to follow this Court's ruling in *Ricks* and decided that pinpointing the respondents' last day of employment in their old status as the point of accrual was "well war-

ranted" as a rule which "best promotes certainty".[4] In so doing, the court below has selected the effective date of change in status as the date of accrual based simply on judicial expedience rather than the nature of the injury. In the instant cases, the injury complained of is an allegedly discriminatory decision not to reappoint respondents to non-permanent positions. Consistent with *Ricks*, the time limitations period must accordingly commence with the date of the alleged injury — the decision not to reappoint — not with an arbitrary date when the change in status occurs.

Finally, the court below attempts to distinguish the notice of non-reappointment in the instant cases from the notice of denial of tenure in *Ricks* by focusing on the amount of time which elapsed between the date of notification and its effective date and upon the formality of the decision-making process. However, this is not a reasoned or logical distinction. The denial of reappointment, like the denial of tenure, is the alleged injury regardless of the formality of the decision-making process or the time period which separated the notice and the date the action became effective.

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[4] The court below cited as authority *Egleston* v. *State University College at Geneseo*, 535 F.2d 752 (2d Cir. 1976); *Rubin* v. *O'Koren*, 621 F.2d 114 (5th Cir. 1980); *Krzyzewski* v. *Metropolitan Government*, 584 F.2d 802 (6th Cir. 1978); *Bohnam* v. *Dresser Industries, Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Moses* v. *Falstaff*, 525 F.2d 92 (8th Cir. 1975) and *Greene* v. *Carter Carburetor Co.*, 532 F.2d 125 (8th Cir. 1976). It should be noted, however, that each of those cases was decided before this Court's decision in *Ricks*.

II. The Decision Of The Court Below Conflicts With Recent Decisions Of The United States Courts Of Appeals For The Fourth And Ninth Circuits.

The decision of the court below is in direct conflict with the recent decision of the United States Court of Appeals for the Fourth Circuit in *Bireline* v. *Seagondollar*, 567 F.2d 260 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979). The facts of *Bireline* are substantially similar to those of the instant cases. The plaintiff in *Bireline* was a North Carolina State University physics instructor who held a non-tenured position on a year-to-year basis. On May 19, 1970, she was notified that her position with the university would be terminated after the expiration of the next academic year. Upon the receipt of this notice, she requested and received reconsideration of the termination decision. On reconsideration, the defendants affirmed the termination decision. The plaintiff then filed an administrative appeal and again the defendants affirmed the decision to terminate the plaintiff's employment. On June 29, 1973, the plaintiff brought suit under 42 U.S.C. §1983 claiming that the termination of her employment was the result of sex discrimination. The district court found that the plaintiff's cause of action accrued on or before May 19, 1970, the date of notice, and was therefore barred by the applicable three-year state statute of limitations. On appeal, the Fourth Circuit affirmed saying that, while the time limitation itself is determined by reference to state law, federal law determines when a federal cause of action accrues. The court affirmed that the plaintiff's cause of action accrued on May 19, 1970, when she was given notice of the termination decision. In the instant cases, however, the court below rejected the First Circuit's holding that an action under §1983 accrues when

notice is given and held instead that the action did not accrue until the effective date of the respondents' change in status.

The decision below also conflicts with the recent decision of the Ninth Circuit in *Jackson* v. *Hayakawa*, 605 F.2d 1121 (9th Cir. 1979), *cert. denied*, 445 U.S. 952 (1980). In *Jackson*, the Court of Appeals found that the plaintiff's cause of action accrued when he received notice of termination of his employment as a college instructor. *Bireline* is cited with approval by the court and is referred to as a case with "an almost identical factual situation," 605 F.2d at 1127. As the Fourth Circuit had in *Bireline*, the Ninth Circuit also said that the statute of limitations was not tolled by an administrative grievance procedure. *Id.*

III. Resolution Of The Conflict Is Necessary To Protect The Important Interests Served By Statutes Of Limitations.

Congress did not establish a statute of limitations applicable to actions brought in federal court under 42 U.S.C. §1983. To fill the void, the state law of limitations governing an analogous cause of action is "borrowed". *Board of Regents, Etc.* v. *Tomanio*, 446 U.S. 478, 483 (1980); *Ricks*, 449 U.S. at _____, 101 S.Ct. at 502, n.5. In §1983 actions the state statute of limitations is "more than a technical obstacle to be circumvented if possible". *Board of Regents*, 446 U.S. at 484. Statutes of limitations serve an important function in the statutory scheme and reflect "a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975). The plea of limitations thus should be regarded

as a "meritorious defense, in itself serving a public interest", *Guaranty Trust Company* v. *United States*, 304 U.S. 126, 136 (1938).

This Court has clearly demonstrated its concern for the importance of statutes of limitations in the administration of the civil rights statutory scheme with recent decisions in *Ricks, supra; United Airlines* v. *Evans*, 431 U.S. 553 (1977); *Occidental Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Johnson* v. *Railway Express Agency, Inc., supra.* The question of when a civil rights cause of action accrues is a vital element of the statutory scheme, a frequently recurring issue, and one which is ripe for resolution in this case.

The value of statutes of limitations is significantly undermined by the lack of a uniform federal rule governing the accrual of §1983 actions. Limitations periods are "fundamental to a well-ordered judicial system", *Board of Regents*, 446 U.S. at 487, but are rendered meaningless in the absence of a rule which determines the commencement of the limitations period. In *Ricks*, this Court settled the question with respect to a denial of tenure, but the court below declined to follow that decision in the instant cases. The question of when a cause of action accrues for a failure to reappoint is an important question worthy of the attention of this Court. The decision of the court below has injected confusion on the issue, particularly in light of this Court's decision in *Ricks* and the clear conflict with the Fourth and Ninth Circuits. Thus, until the First Circuit's decision is reviewed by this Court, there will be continued uncertainty as to the point of accrual in §1983 and other civil rights actions.

CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Court of Appeals Decisions

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No.80-1237*

RAFAEL RIVERA FERNANDEZ, *Plaintiff, Appellant,*

v.

CARLOS CHARDON, ETC., *Et Al., Defendants, Appellees.*

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[HON. JUAN R. TORRUELLA, *U.S. District Judge*]
[HON. JUAN M. PEREZ-GIMENEZ, *U.S. District Judge*]

Before
CAMPBELL, BOWNES and BREYER,
Circuit Judges.

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* [footnote in original] This opinion disposes of appeals in the following additional cases:

No. 80-1238, Angel L. Arzon Mendez v. Carlos Chardon, et al.
No. 80-1245, Ramon A. Vega Cruz v. Carlos Chardon, et al.
No. 80-1247, Laura L. Santos Roa v. Carlos Chardon, et al.
No. 80-1249, Angel Luis Allende v. Carlos Chardon, et al.
No. 80-1254, Evelyn Irizarry Escobar v. Carlos Chardon, et al.
No. 80-1339, Enrique Diaz Maldonado v. Carlos Chardon, et al.
No. 80-1340, Jose D. Nieves Rivera v. Carlos Chardon, et al.
No. 80-1341, Aida L. Sanchez de Negron v. Carlos Chardon, et al.
No. 80-1342, Herminia A. Ortiz-Ortiz v. Carlos Chardon, et al.
No. 80-1343, Jose R. Munoz Rivera v. Carlos Chardon, et al.

Filed: May 8, 1981

Sheldon Nahmod, with whom *Hiram R. Cancio, Harry R. Nadal-Arcelay, Jaime R. Nadal-Arcelay, Blanca I. Mera-Roure, Jesus R. Rabell-Mendez,* and *Cancio, Nadal & Rivera,* were on briefs, for appellants Rafael Rivera-Fernandez, Angel L. Arzon-Mendez, Ramon A. Vega Cruz, Laura L. Santos-Roa, Angel L. Allende-Velazquez, Evelyn Irizarry-Escobar, Enrique Diaz-Maldonado, Jose D. Nieves-Rivera, Aida L. Sanchez De Negron, Herminia Ortiz-Ortiz, Jose R. Munoz-Rivera, Eduardo Tarafa-Gonzalez, Gladys Rosado-Acevedo, Roberto Velazquez-Nieves, Sara Velazquez-Concepcion, Cecilio Alvarez-Plajas, Enrique Rosado-Alverio, Julia Martinez Vda. De Calderon, Saquia Azize-Mawad, Isaias Torres-Sanchez, Miguel Alvelo-Rodriguez, Irma L. Baldoni De Valencia, and Manuel Rosas-Lebron.

Roberto L. Cordova, with whom *Brown, Newsom & Cordova,* and *Ines Equia Miranda* were on brief, for appellees.

May 8, 1981

Campbell, *Circuit Judge,* Each of these 23 cases raises the issue of when the statute of limitations began to run on an

No. 80-1344, Eduardo Tarafa Gonzalez v. Carlos Chardon, et al.
No. 80-1345, Gladys Rosado Acevedo v. Carlos Chardon, et al.
No. 80-1392, Roberto Velazquez Nieves v. Carlos Chardon, et al.
No. 80-1404, Sara Velaquez Concepcion v. Carlos Chardon, et al.
No. 80-1506, Cecilio Alvarez Plajas v. Carlos Chardon, et al.
No. 80-1507, Enrique Rosado Alverio v. Carlos Chardon, et al.
No. 80-1508, Julia Martinez Vda de Calderon v. Carlos Chardon, et al.
No. 80-1509, Saquia Azize Mawad v. Carlos Chardon, et al.
No. 80-1510, Isaias Torres Sanchez v. Carlos Chardon, et al.
No. 80-1511, Miguel Alvelo Rodriguez v. Carlos Chardon, et al.
No. 80-1512, Irma I. Baldoni de Valencia v. Carlos Chardon, et al.
No. 80-1513, Manuel Rosas Lebron v. Carlos Chardon, et al.

employee's claim that he or she was wrongfully demoted or fired because of political affiliation: the precise question is whether the limitations period began upon receipt of advance notification of demotion or discharge, or whether it dated from the time the employee stopped working at the job from which he or she was removed.

The plaintiffs in these 23 cases were all employed during the 1976-1977 school year as non-tenured administrators in the Commonwealth of Puerto Rico Department of Education. The plaintiffs were all active members of the Popular Democratic Party which was in power in Puerto Rico in the fall of 1976. A gubernatorial election was held in that year, in which a candidate of the New Progressive Party was elected. In March 1977 the new governor appointed defendant Carlos Chardon as Assistant Secretary of Public Education in charge of personnel. Sometime between June 3 and June 17, 1977, each plaintiff received a letter advising him or her that "the appointment to the position you now occupy expires with the termination of the present school year." The letters received by 20 of the plaintiffs indicated that they would be reinstated to tenured positions they had previously held as teachers or lower level administrators. The other three, who had not previously held tenured positions, were told that their employment with the Department would cease. Each of the 23 letters indicated a date, between June 30 and August 8, when the action would take effect. The plaintiffs responded, most within a few days of receiving the notice, by a letter to defendant stating that "I am not in agreement with your decision . . . To this effect I have remitted copy of the same to the Puerto Rico Teachers Association so that said organization may instruct its Legal Division to take the necessary action." The demotions and terminations all occurred as scheduled.

On June 19, 1978, one Jose Ortiz Rivera, another Department of Education employee who had suffered similar treatment, filed suit in the United States District Court for the District of Puerto Rico under 42 U.S.C. §1983. Ortiz Rivera claimed that the action had been taken because of his political

affiliation, in violation of the first and fourteenth amendments to the United States Constitution. He purported to represent a class of over 100 persons, including these 23 plaintiffs. Class certification was denied, and each of these plaintiffs then filed a separate complaint, making essentially the same substantive allegations. The district court dismissed all 23 complaints on the ground that they were barred by the one-year statute of limitations applicable to section 1983 actions under 31 L.P.R.A. §5298(2).

On appeal, the parties are agreed that section 5298 is the applicable statute of limitations,[1] and that the present actions were commenced, for limitations purposes, on June 19, 1978, when Ortiz Rivera filed his complaint. If the one-year limitations period began to run when plaintiffs received notice of demotion or discharge (in each case before June 19, 1977), the current actions are untimely (unless the statute was interrupted, *see* note 2, *infra*). However, if the limitations period began later, when the demotion or discharge took effect (in each case after June 19, 1977), the present cases are not time barred. We hold that plaintiffs' cause of action accrued, and the limitations period began, on the date when the demotions or discharges took effect.[2]

Since section 1983 fixes no limitations period of its own, federal courts in section 1983 actions apply the limitations period provided by state law for the most closely analogous type of action, along with any state tolling rules. *Board of*

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[1] The statute reads, in applicable part,

"The following prescribe in one year:

(1) . . .

(2) Actions to demand civil liability for grave insults or calumny, and for obligations arising from the fault or negligence in section 5141 of this title, from the time the aggrieved person has knowledge thereof."

[2] This decision makes it unnecessary to reach plaintiffs' alternative argument that the running of the limitations period was interrupted by their letters of protest, which they characterize as "extrajudicial claims" within 21 L.P.R.A. §5303.

Regents v. *Tomanio,* 446 U.S. 478 (1980). When the cause of action accrues, however, is a question of federal law, *Rubin* v. *O'Koren,* 621 F.2d 114, 116 (5th Cir. 1980); *Briley* v. *State of California,* 564 F.2d 849, 855 (9th Cir. 1977); *Cox* v. *Stanton,* 529 F.2d 47, 50 (4th Cir. 1975); *Kaiser* v. *Cahn,* 510 F.2d 282, 285 (2d Cir. 1974). *Cf. Cope* v. *Anderson,* 331 U.S. 461, 464 (1947) (federal law determines when cause of action accrued in suit by receiver of national bank to collect assessment from stockholder); *Rawlings* v. *Ray,* 312 U.S. 96, 98 (1940) (same). In the instant cases, the district court held that a cause of action accrues "when plaintiff knows or has reason to know of the injury which is the basis of the action." The court found that the plaintiffs knew of the harm when they received the letters more than one year before the suit was filed. The court relied on two federal cases, *United States* v. *Kubrick,* 444 U.S. 111 (1979) (medical malpractice claim against Veterans Administration under Federal Tort Claims Act) and *Mitchell* v. *Hendricks,* 431 F.Supp. 1295 (E.D.Pa. 1977) (section 1983 claim by prisoner for injury resulting from denial of medical treatment). In both of these cases, the plaintiff had no reason to know of the physical harm underlying his claim until sometime after it had occurred. The rule of accrual at the time of notice therefore served to extend, rather than to shorten, the limitations period. Similarly, a rule based on notice was applied to extend the limitations period in *Lavallee* v. *Listi,* 611 F.2d 1129 (5th Cir. 1980) (prisoner injured by negligently performed medical procedure; limitations period began only when prisoner knew or should have known that procedure was the cause of his continuing symptoms): *Briley* v. *State of California,* 564 F.2d 849 (9th Cir. 1977) (section 1983 action for fraudulently induced plea bargain; limitations period began only when plaintiff discovered fraud or could have done so); *Cox* v. *Stanton,* 529 F.2d 47 (4th Cir. 1975) (section 1983 action for forced sterilization; limitations period began only when plaintiff learned that the operation was permanent); and *Young* v. *Clinchfield Railroad,* 288 F.2d 499 (4th Cir. 1961) (Federal Employer's Liability Act action for disease resulting from exposure to toxic material; limitations period began only when disease diagnosed).

We are aware of only one case which has applied this rule prospectively, *Bireline* v. *Seagondollar*, 567 F.2d 260 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979). In that case a non-tenured university instructor was notified in May 1970 that her contract would not be renewed at the end of the 1970-71 school year. Citing *Cox* v. *Stanton* and *Young* v. *Clinchfield Railroad*, the court held that the instructor's cause of action under section 1983 had accrued when she received notice, even though her termination had not yet occurred. The court did not discuss the policies underlying the notice rule, nor did it explicitly consider whether those policies should properly be applied where notice precedes the challenged action.[3]

In *Egleston* v. *State University College at Geneseo*, 535 F.2d 752 (1976), the Second Circuit took the opposite view on similar facts. The plaintiff, a non-tenured faculty member, was notified in May 1972 that her contract due to expire in June 1973, would not be renewed. In her suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, the court held that June 1973 was the crucial date, since her "primary grievance . . . is rooted in her discharge," and "Appellant's discharge was consummated only when she left the university — or, possibly, when a replacement was hired." *Id.*, at 755.[4]

Four other circuits have indicated agreement with *Egleston*, although in none of these cases was the same issue directly presented for decision. *Rubin* v. *O'Koren*, 621 F.2d 114, 116 (5th Cir. 1980) (due process claim under section 1983 by discharged instructor); *Kryzewski* v. *Metropolitan Government*, 584 F.2d 802, 806 (6th Cir. 1978) (sex discrimination ac-

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[3] *Bireline* is cited with apparent approval in *Jackson* v. *Hayakawa*, 605 F.2d 1121, 1127 (9th Cir. 1979), *cert. denied*, 445 U.S. 952 (1980), but it is unclear whether this aspect of the holding in *Bireline* was actually applied in *Jackson;* the court there focussed on the date of notice, but the facts as stated in the opinion give the impression that the plaintiff had stopped working before he received notice of his termination.

[4] The Second Circuit followed this holding in *Noble* v. *University of Rochester*, 535 F.2d 756 (1976).

tion under Title VII by discharged policewoman); *Bonham* v. *Dresser Industries,* 569 F.2d 187, 192 (3rd Cir. 1977), *cert. denied,* 439 U.S. 821 (1978) (age discrimination claim under 29 U.S.C. §623); *Moses* v. *Falstaff,* 525 F.2d 92, 95 (8th Cir. 1975) (age discrimination claim under section 623). *See also Greene* v. *Carter Carburetor Co.,* 532 F.2d 125, 127 (8th Cir. 1976) (Title VII claim).

We think the court in *Bireline,* and the district court in the present cases, misconstrued the notice rule. In our view, that rule has developed as a safeguard against unfairness to plaintiffs who, through no fault of their own, are unaware of their injuries until after the tortious act occurs. In such cases, the rule operates to postpone the running of the limitations period in order to give the plaintiffs a reasonable time in which to act once they have learned that they have suffered harm. The notice rule does not, however, alter the general rule that no cause of action exists until an unlawful act has occurred. Tort law has not traditionally recognized a doctrine of "anticipatory breach" comparable to that in contracts.[5]

The issue of when the cause of action accrues depends, we believe, on when the alleged unlawful act occurred. It is necessary, therefore, to identify the unlawful act. Where, as here, the claim is that an employment decision was made for a prohibited reason, it could be argued that the unlawful act was the making of the decision, rather than the implementation of it. But we think such a refined rule would depart too sharply from the understanding of ordinary people. The plain-

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[5] We note that the Puerto Rico statute of limitations provides that actions prescribe within one year "from the time the aggrieved person has knowledge thereof." *See* note 1, *supra.* No Puerto Rico authorities have been called to our attention, however, which suggest that this rule is meant to apply in cases, such as the present, where notice has been given in anticipation of the actual harm. Thus, while federal law would be controlling on accrual in any event, we are aware of nothing inconsistent with our analysis in the Puerto Rico statute and precedents. Indeed, the general federal accrual rule appears no different from that of Puerto Rico.

tiffs in these cases are complaining that they were demoted or discharged, not merely that a decision was made on a particular occasion, of which notice was then given, to take such action against them. Had the decision been made but not yet implemented, equitable relief might have been sought to forestall irreparable harm, but it is unlikely that plaintiffs would have sought or received damages until or unless the threatened action was consummated.[6] The alleged unlawful act was revocable, incomplete and, for practical purposes, nonexistent until the actual demotion or discharge.[7]

Moreover, important policies of judicial administration favor a rule based on the date of implementation. While the date of notice in the present cases was easily established, other cases would surely arise in which resolution of that question would require lengthy proceedings. Notice might be oral, or it might be ambiguously phrased, or it might be transmitted by one whose authority is subject to question. We see no value in requiring courts and parties to devote their resources to litigating the adequacy of notice, when the date of the action itself is easily determined. In saying this, we are aware that the Supreme Court has declined to reach out for an easily identified date when that date bears no genuine relationship to the act of which plaintiff complains. *Compare Delaware State College* v. *Ricks,* 49 U.S.L.W. 4058 (Dec. 15, 1980) (date of termination not suficiently connected to the challenged denial of tenure), discussed *infra.* But where, as here, the date that is

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[6] We are not now faced with the question whether a mere threat of discharge or demotion, intended to chill the exercise of first amendment rights, would in itself give rise to a cause of action. *Compare Elrod* v. *Burns,* 427 U.S. 347 (1976). Plaintiffs here complain not of a mere threat, but of consummated action.

[7] We do not read the complaints in these cases as charging a "continuing violation" in which the decision and the act were two consecutive elements. *See Goldman v. Sears, Roebuck & Co.*, 607 F.2d 1014 (1st Cir. 1979), *cert. denied*, 445 U.S. 929 (1980). Rather, in our view each complaint charges a single act of discrimination which was consummated on the date that each plaintiff was discharged or demoted.

most closely related to the plaintiffs' claim is also the date most easily identified, we think concern for adoption of the rule that best promotes certainty and eliminates litigation over technical niceties is well warranted.

After the district court's decision of these cases, the Supreme Court decided *Delaware State College* v. *Ricks, supra*. Defendants contend that that decision compels affirmance here. We disagree. Ricks, a black Liberian instructor, was informed in June 1974 that the faculty of Delaware State College had voted to deny him tenure. In accordance with the school's usual practice, he was thereafter granted a one-year terminal contract, after which his employment with the school ended. In his suit alleging discrimination on the basis of national orgin. Ricks contended that the limitations period under Title VII began to run only when he left the university in June 1975. The Supreme Court rejected this argument and concluded that Ricks' cause of action had accrued when he was notified of the denial of tenure, in June 1974, and that his suit was therefore barred. The Court focussed on the allegations of Ricks' complaint, which it found to charge discrimination in the denial of tenure, not in the discharge or any other subsequent action. The Court held that the denial of tenure was the "unlawful employment practice" within the meaning of Title VII, and that the date of that action was therefore the beginning of the limitations period. Three justices, in dissent, accepted the majority's analysis (*i.e.*, that denial of tenure, not discharge, was the unlawful employment practice) but placed the denial of tenure at a later date because of the later decision of an internal grievance board. Justice Stevens, alone among the justices, took the view that denial of tenure is analogous to advance notice of discharge. Based on that analogy, he argued that the date of discharge should control.

Refusal of the *Ricks* majority to adopt Justice Stevens' analogy does not seem to us in any way to repudiate the precedents to which he sought to draw an analogy. The majority held merely that the denial of tenure in the academic setting is

fundamentally different from a notice of discharge; it is a distinct and separate employment action, with important and far-reaching consequences for all aspects of the employee's status. While denial of tenure is often followed by discharge, it is not always, and the consequences of denial of tenure are not dependent on its being followed by discharge. The Court found that Ricks' complaint was based on the denial of tenure, which was effective immediately; it followed, therefore, that the limitations period began as soon as Ricks received notice of that action. Here, plaintiffs complain of discharges and demotions, not of any distinct event that occurred on an earlier date. The letters notifying them of the planned actions were notice and nothing more; they were not actions in themselves comparable to the denial of tenure.[8]

To be sure, as we have said, one can argue that the notices themselves mirror the allegedly discriminatory motives of the defendants. One can also argue that a suit for injunctive relief might lie after receipt of notice (or, indeed, even before) to forestall threatened irreparable harm. Still plaintiffs' quarrel is with their demotions and discharges — not with the notices themselves. No actual harm is done until the threatened action is consummated. Until then, the act which is the central focus of the plaintiffs' claim remains incomplete. Such was not the situation in *Ricks,* where the denial of tenure was itself the completed act being challenged.

We conclude, therefore, that *Ricks* is inapplicable to these cases, and that the district court erred in dismissing the complaints.

The judgments of the district court are vacated and the cases are remanded for further proceedings not inconsistent herewith.

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[8] Were the decision separated from its implementation by a greater time period than is involved here, and were the decision-making process more formal and definitive than appears here, the analogy to a tenure decision would be closer. But at least where action taken follows quite soon after receipt of the notice, as happened here, we view the date of implementation as determinative for limitations purposes.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1649 *

CASPAR RODRIGUEZ RODRIGUEZ, *Plaintiff, Appellant,*

v.

CARLOS CHARDON, ETC., *Et Al., Defendants, Appellees.*

JUDGMENT

Entered: June 11, 1981

Upon motion of appellants requesting the entry of judgment, and without opposition, and in the light of the decision of this Court in *Rafael Rivera Fernandez* v. *Carlos Chardon, et al.*,

It is now here ordered, adjudged, and decreed as follows:

The judgment of the District Court is vacated and the cause is remanded for further proceedings not inconsistent

* Identical judgments of the Court of Appeals were also entered on the same date in the following additional cases:

APPELLANT	CASE NO.
Aida E. Santiago de Orta	80-1838
Yolanda Anguita de Rios	80-1839
Jose M. Rosado Sanchez	80-1840
Wilfredo Cintron Santana	80-1844
Ramon A. Perez-Ramirez	80-1848
Carmen Roman de Molina	81-1001
Blanca Cacho Collazo	81-1002
Pahita Guadalupe Garcia	81-1003
Aida Lopez de Ferra	81-1004
Carlos Cruz Beltran	81-1006
Fanny Cacho de Freytes	81-1008
Claudio Aviles Navarro	81-1194

with the opinion of this Court filed on May 8, 1981, in No. 80-1237 *Rafael Rivera Fernandez* v. *Carlos Chardon, et al.* [U.S.D.C. P.R. No. 79-365].

By the Court:

/s/ DANA H. GALLUP

Clerk.

APPENDIX B

District Court Decisions And Orders

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

Civil No. 79-165

RAFAEL RIVERA FERNANDEZ, *Plaintiff*

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of personnel of Public Education of the Commonwealth of Puerto Rico, *Defendants*

ORDER

(Filed March 31, 1980)

The plaintiff instituted this civil rights action under 42 U.S.C. 1983, 28 U.S.C. 2201, 2202, and by virtue of this Court's pendent jurisdiction under local law, 18 L.P.R.A., 211, 214, 249(e), alleging a work demotion based on political considerations.

The facts which give rise to this case may be briefly outlined as follows: The plaintiff is an employee of the Department of Education. During 1976 he was promoted, and employed by the Department of Education for the 1976-1977 school year as Intermediate School Director IV. The referred promotion was on a non-permanent basis. Through a letter dated June 8, 1977, and signed by Julio Cintron Lopez, Director of Personnel of the Department of Education, the plaintiff was notified that his non-permanent appointment would

expire at the conclusion of the present school year, and that he would be reassigned to his permanent position,[1] as Elementary School Principal II in the District of Naranjito, effective July 1, 1977. Thereafter, on June 16, 1977, in a letter to the Honorable Carlos Chardon, plaintiff informed his disagreement and stated that although he would comply with the order, the matter was to be referred to the Teacher's Association in order for its legal division to take the necessary action.

Defendants have filed a Motion to Dismiss based on the grounds that the complaint, filed on January 15, 1979, is time-barred by the statute of limitations. The motion stands submitted for us to consider. It is not contested that this is an action governed by the one-year time limitation set out in Article 1868(2) of the Civil Code of Puerto Rico, 31 L.P.R.A. 5298(2):

> "The following prescribe in one year:
>
> (1) . . .
>
> (2) Actions to demand civil liability for grave insults or calumny, and for obligations arising from the fault or negligence in section 5141 of this title, from the time the agrieved person has knowledge thereof."[2]

It is clear that the limitations period is borrowed from local law, *Henig* v. *Odorisso,* 385 F.2d 491 (3 Cir. 1969), and that the one-year limitation period is applicable to the case at bar. *Ignacio Gual Moraliz* v. *Hernandez Vega,* 579 F.2d 677 (1 Cir. 1978); *Hernandez Jimenez* v. *Calero Toledo,* 576 F.2d 404 (1 Cir. 1978); *Ramirez de Arellano* v. *Alvarez,* 575 F.2d 315 (1 Cir. 1978).

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[1] Position No. 0144

[2] Section 5141 provides: "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of indemnity". 31 L.P.R.A. 5141

However, the problem to be solved is the time when the cause of action accrued and, accordingly, when did the one-year time period commenced running.

The question of when a federal action accrues is one governed by Federal Law. *United States* v. *Kubrick, 48 U.S.L.W. 4030 (Nov. 29, 1979). The jurisprudence has established that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action. Michell* v. *Hendricks,* 431 F.Supp. 1295 (E.D.Pa. 1977). Knowledge of the injury is the determinant factor in order to determine the running of the period of limitations. In this respect federal law is similar to the applicable local provision 31 L.P.R.A. 5298(2), *supra.*

In the case at hand the plaintiff received the letter of reassignment on June 15, 1977.[3] The receipt of said notice cannot be characterized as threat of future harm not realized. The Court finds that upon the receipt of the official notice of reassignment, whereby through the competent authority plaintiff knew the harm, is by itself harm realized, and that from this time a complete and present cause of action existed. *Blake* v. *Town of Delaware,* 441 F.Supp. 1189 (D.Del. 1977); *Rowlings* v. *Ray,* 312 U.S. 96 (1941). Through the letter of reassignment claimant was informed and therefore knew the contractual terms ceased with the end of the preceding school year. Thus, upon receipt of the referred letter, plaintiff could have no reasonable expectations of working as Intermediate School Director IV at the beginning of the next school year.

This Court fails to find merit in plaintiff's assertions to the effect that the cause of action has failed to accrue because he is still suffering from the effects of discrimination. *Goldman* v. *Sears* (1 Cir., Oct. 10, 1979); *Fitzgerald* v. *Seamans,* 553 F.2d 220 (C.A.D.C. 1977). Even threat of dismissal is actual harm. *Elrod* v. *Burns,* 427 U.S. 347 (1976).

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[3] Plaintiff has indicated that the letter was received on June 15, 1977.

This Court finds that the period of limitations started to run on June 16, 1977, the day after plaintiff received the referred letter. *Cintron* v. *Insular Industrial,* 58 P.R.R. 820 (1941). The action filed on January 15, 1979, is time barred.[4] Therefore, the complaint is accordingly DISMISSED.

IT IS SO ORDERED.*

San Juan, Puerto Rico, March 31, 1980.

/s/ JUAN M. PEREZ-GIMENEZ
Juan M. Perez-Gimenez
U. S. District Judge

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[4] This Court cannot find the instant action timely by virtue of the petition for class action, filed on June 19, 1978, because at that time the one-year period had already elapsed.

* *See footnote next page.*

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* Virtually identical orders — differing in material respects only as to recitals of the date plaintiff received notice of the employment action, its effective date, and the date plaintiff's complaint was filed — were issued by the District Court in the following additional cases:

ORDER DATE	PLAINTIFF	CIVIL NO.	NOTICE DATE	EFFECTIVE DATE	COMP-LAINT DATE
3/31/80	Arzon Mendez	79-214	6/7/77	8/1/77	1/15/77
3/31/80	Vega Cruz	79-216	15 days after 5/26/77	6/30/77	1/15/77
3/31/80	Santos Roa	79-81	6/16/77	8/8/77	1/10/79
3/31/80	Irizarry Escobar	79-69	6/15/77	End of school year	1/10/79
6/30/80	Alvarez Plajas	79-68	6/6/77	End of school year	1/10/79
6/30/80	Rosado Alverio	79-77	6/6-6/10/77	End of school year	1/10/79
6/30/80	Martinez Vda. de Calderon	79-189	6/3/77	End of school year	1/15/79
6/30/80	Azize Mawad	79-193	6/3/77	End of school year	1/15/79
6/30/80	Torres Sanchez	79-223	6/12/77	End of school year	1/15/79
6/30/80	Alvelo Rodriguez	79-226	6/13/77	End of school year	1/15/79
6/30/80	Baldoni de Valencia	79-327	6/6/77	8/1/77	1/26/79
6/30/80	Rosas Lebron	79-328	2nd week of June, 1977	6/30/77	1/15/79
9/19/80	Rodriguez Rodriguez	79-190	6/12/77	End of school ye[illegible]	1/15/79

Although the foregoing orders also differ in their references to the positions in the Department of Education applicable to the different plaintiffs involved, these differences are not material to this Court's consideration of this Petition.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

Civil No. 79-165

RAFAEL RIVERA FERNANDEZ, *Plaintiff*

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico, *Defendants*

ORDER

This case is now before us upon plaintiff's Motion for Relief From Judgment Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, and defendants' opposition thereto.

This Court entered an order dismissing the complaint upon a determination that we lacked jurisdiction to entertain the action in view that the complaint was time-barred by virtue of the one-year-time limitation set forth in Article 1868(2) of the Civil Code of Puerto Rico, 31 L.P.R.A. 5298(2).

Judgment was entered by the Clerk and notice of appeal was subsequently filed by the plaintiff.

Despite the fact that an appeal to the Circuit Court has been filed, this Court retains jurisdiction to entertain the instant motion. The United States Court of Appeals for the First Circuit has adhered to the rule which does not require Rule 60(b) motions to be screened at the circuit level prior to their being filed in district courts. *Folzarano* v. *U. S.*, 607 F.2d 506 (1 Cir., 1979). The district court derives its authority to pass

on the matter on its continuing jurisdiction during an appeal to act in aid of the appeal. The First Circuit in the leading case of *Commonwealth of Puerto Rico* v. *S.S. Zoe Colocotroni,* 601 F.2d 39 (1 Cir., 1979), held:

> an appeal is brought to their attention can be expected to act promptly on most 60(b) motions, particularly frivolous motions or those which raise issues the court has already considered." At page 41.

It appearing that the Court may consider the instant motion, we now proceed to examine the request itself.

Plaintiff alleges that we should reconsider our ruling in the light of the decision of *Burns* v. *Sullivan,* (1 Cir., March 31, 1980). In the referred decision the Court of Appeals resumed the well-known principles that federal courts will look to the state statute or remedy "most analogous" to the particular civil rights cause of action to determine the time limitation under the Civil Rights Act, and that the most analogous state law will be applied unless it is inconsistent with the federal policy underlying the cause of action under consideration.

In the method for determining the applicable state statute of limitations, the Circuit based on case law outlined four steps, to wit:

1. The nature of the federal cause of action;

2. The analogous state causes of action;

3. The state statutes of limitations for those causes of action, and

4. Which of the state statutes of limitations is the most appropriate under federal law.

Based on the *Burns* decision plaintiff now alleges that the Puerto Rico statute regulating political discharge of employees (29 L.P.R.A. 136) is more analogous to a 1983 action such as

the present one, than the general tort statute. The section now alluded by plaintiff provides:

> "Any employer who dismisses, suspends, refuses to reinstate in his job, demotes, reduces the pay, or increases the working hours of, or imposes or attempts to impose heavier working conditions on, any employee or ex-employee; or who in any way discriminates against him, or threatens to commit any such act, on the grounds of his affiliation with a particular political party, shall be civilly liable for a sum equal to double the amount of the damages he may have caused the said employee or ex-employee through such action, or for a sum of not less than fifty (50) nor more than one thousand (1,000) dollars, in the discretion of the court, where the pecuniary damages cannot be determined or where double the amount thereof is less than the sum of fifty (50) dollars; or for a sum equal to double the amount of the damages caused the employee or ex-employee through such action, plus an additional sum not exceeding one thousand (1,000) dollars, in the discretion of the court.
>
> "The court may also direct the employer to reinstate the laborer in his employ, and to desist and cease from committing the act in question." 29 L.P.R.A. 136.

Plaintiff then avers that the proper prescription period should in fact be three years as provided by Section 5297 of Title 31 L.P.R.A. This section provides:

> "Actions for the fulfilment of the following obligations shall prescribe in three years:
>
> 1. For the payment of judges, lawyers, registrars, notaries public, experts, agents, and clerks, for their charges and fees and the expenses and disbursements incurred by them in the discharge of their duties or offices in the matters to which the obligations refer.
>
> 2. For payments to apothecaries for medicines which they have supplied; to *professors and teachers for their salaries*

and stipends for the instruction they have given, or for the exercise of their profession, art, or trade.

3. For the payment of mechanics, servants, and laborers the amounts due for their services, and for the supplies or disbursements they may have incurred with regard to the same.

4. For the payment of board and lodging to innkeepers, and to traders for the value of goods sold to others who are not traders, or who, being such, are engaged in a different trade.

The time for the prescription of actions referred to in the three preceding paragraphs shall be counted from the time the respective services have ceased to be rendered." (emphasis supplied)

We fail to agree with plaintiff's contention that there is a three-year statute of limitations which should apply in the present case. The above cited section (31 LPRA 5297) provides teachers and professors with a three-year term to file wage claims for their services. It is clear, however, that no such claim is involved in the present action. Plaintiff's allegations and the asserted jurisdictional grounds evince that this action involves a different claim from the one encompassed in 31 LPRA 5297. Plaintiff herein initiated a civil rights violation which has been repeatedly held to fall under Section 5298 of Title 31 LPRA.[1] See *Graffals* v. *Garcia*, 550 F.2d 687 (1 Cir., 1977).

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[1] In the case of *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d 315 (1 Cir., 1978) plaintiff alleged a three-year statute of limitations claiming that under 29 LPRA 136 (see text supra) Puerto Rico had its own statute for the political discharge of an employee and that the limitations period for this cause of actions is three years. The First Circuit ruled: ". . . even assuming that plaintiff's action were for a political firing, it does not appear that she is correct in claiming that a three-year limitations period applies." At 318.

The holding in *Burns* v. *Sullivan*, *supra*, is consistent with our ruling inasmuch as the case also stands for the proposition that in the absence of limitations provisions in statutes specifically tailored to deal with a plaintiff's causes of action, the general tort statute of limitations shall apply as the most analogous. See *Burns* v. *Sullivan*, *supra*, at 13.

There being no limitation statute which specifically would apply to a situation like the one considered herein, we reiterate that the one-year period provided by Section 5298(2) of Title 31 LPRA is the applicable statute. *Graffals* v. *Garcia*, *supra*.

WHEREFORE, in view of the foregoing, plaintiff's Motion for Relief from Judgment, is hereby DENIED.

IT IS SO ORDERED.*

San Juan, Puerto Rico, August 19, 1980.

/s/ JUAN M. PEREZ-GIMENEZ
Juan M. Perez-Gimenez
U. S. District Judge

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* Identical orders were issued by the District Court on the same date in the following additional cases:

PLAINTIFF	CIVIL NO.
Arzon Mendez	79-214
Vega Cruz	79-216
Santos Roa	79-81
Irizarry Escobar	79-69
Alvarez Plajas	79-68
Rosado Alverio	79-77
Martinez Vda. de Calderon	79-189
Azize Mawad	79-193
Torres Sanchez	79-223
Alvelo Rodriguez	79-226
Baldoni de Valencia	79-327
Rosas Lebron	79-328

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

Civil No. 79-165

RAFAEL RIVERA FERNANDEZ, *Plaintiff*

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary in charge of Personnel of Public Education of the Commonwealth of Puerto Rico, *Defendants*

ORDER

(September 12, 1980)

This matter is now before us upon plaintiff's Motion for Reconsideration of Order Denying to Vacate Judgment Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Plaintiff herein alleges that in the light of the decision in the case of *Betty K. Keasler Rubin* v. *Marie L. O'Koren, et al*, 621 F2d 114 (5 Cir., 1980) our Order of August 19, 1980, denying relief from judgment, should be reconsidered.

Having examined the referred decision, we find that the same is not incompatible with out prior orders.

In the *Rubin* case the court held that until her last day of employment, Rubin could not be certain that she would suffer any recompensable injury. Thus, although one year before the expiration of her current contract she was notified that the same would not be renewed, the court held that her cause of action accrued when her employment period terminated.

The situation in the *Rubin* case is distinguishable from the facts in the present action.

The instant case is distinguishable in first place because plaintiff herein knew that the contract was of a transitory nature. In fact, plaintiff was informed from the moment of appointment in this non-permanent position that the contract was for a fixed term. The letter signed by the Secretary of Public Education, Ramon A. Cruz, notifying the appointment, evinces that said contract was for one year, and plaintiff was further appraised that the contract may be renewed at the *conclusion of the school year* and after duly considering factors such as the recommendations by the immediate supervisor, the need of the services and the availability of economic resources. Thus, from the initial moment plaintiff had knowledge of the full duration of the contract since the terms of the appointment specifically provided that the contract was to terminate at the end of the academic year.

At the conclusion of the school year plaintiff was notified that the contract would not be renewed.

With the purpose of bringing the ruling of the *Rubin* decision to the present case it is now alleged that plaintiff's last day of employment was July 31, 1977. However, the local statutes provide that "the school year shall in no case exceed ten months and shall be as much less as the Secretary of Education shall direct, provided that the school year shall in no case be less than eight months. . . .". 18 L.P.R.A. 77.

Certainly; the school year had expired when plaintiff received the letter of reassignment. Therefore, we find that it was at that time when the cause of action under Section 1983 accrued[1] since at that time, after the conclusion of the school year and through a letter signed by competent authority, plaintiff knew that the position held on the temporary basis had come to an end.

Under 1983 a cause of action accrues when the plaintiff *knows* or *has reason to know* of the injury which is the basis of the action.

[1] It is not questioned that the issue of when a federal cause of action accrues is a matter of federal law.

The element of knowledge is the determinant factor. *United States* v. *Kubrich*, 48 L.W. 4030 (November 27, 1979). If in the *Rubin* case knowledge of the harm was realized on her last day of employment, in the present case the knowledge of the harm came upon receipt of the letter of reassignment.

WHEREFORE, in view of the above plaintiff herein knew at the time of the receipt of the letter of reassignment and upon said notification the alleged injury which is the basis of this action. Accordingly, plaintiff's motion is hereby DENIED.

IT IS SO ORDERED. *

San Juan, Puerto Rico, September 11, 1980.

/S/ JUAN M. PEREZ-GIMENEZ
Juan M. Perez-Gimenez
U. S. District Judge

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* *See footnote next page.*

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* Virtually identical orders — differing only in the citations of certain authorities either in footnotes or in text — were issued by the District Court in the following additional cases:

ORDER DATE	PLAINTIFF	CIVIL NO.
9/11/80	Arzon Mendez	79-214
9/29/80	Vega Cruz	79-216
9/10/80	Alvarez Plajas	79-68
9/10/80	Martinez Vda. de Calderon	79-189
9/11/80	Azize Mawad	79-193
9/18/80	Torres Sanchez	79-223
9/10/80	Rosas Lebron	79-328
11/14/80	Alvelo Rodriguez	79-226

The orders in Vega Cruz (79-216) and Alvelo Rodriguez (79-226) contain the following footnote referenced after the third paragraph of text ending with "prior orders":

The holding of our decision has been reiterated by the U.S. Supreme Court, the Court of Appeals for the First Circuit, and other Circuits, including the Fifth Circuit. *U. S.* v. *Kubrich*, _____ U.S. _____ (1979); *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d 315 (1 Cir., 1978); *Lavillee* v. *Listi*, 611 F.2d 1129 (5 Cir., 1980); *Bireline* v. *Seagondollar*, 567 F.2d 260 (4 Cir., 1977); *Cox* v. *Stanton*, 529 F.2d 47 (4 Cir., 1975).

The order in Torres Sanchez (79-233), in the next to last paragraph before the WHEREFORE paragraph, reads as follows:

Under 1983 a cause of action accrues when the plaintiff *knows* or *has reason to know* of the injury which is the basis of the action. *Cox* v. *Stanton*, 529 F.2d 47, 50 (4 Cir., 1975); *Biriline* v. *Seagondollar*, 567 F.2d 260 (4 Cir., 977). This Court finds that the rule has been well defined in our Circuit *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d 315 (1 Cir., 1978).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

79-71

ANGEL LUIS ALLENDE VELAZQUEZ, *Plaintiff,*

v.

CARLOS CHARDON, individually and as SECRETARY OF PUBLIC EDUCATION OF THE COMMONWEALTH OF PUERTO RICO

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of PUBLIC EDUCATION OF THE COMMONWEALTH OF PUERTO RICO, *Defendants.*

DECISION AND ORDER

The present civil rights action is now before us on Defendant's "Motion to Dismiss and/Or For Judgment on the Pleadings" and Plaintiff's "Motion to Strike Affirmative Defenses." Each Motion has been duly opposed and extensively argued.

The basic facts, and chronological history of this case, are simple and generally not disputed. Defendants in this suit are the Secretary and the Personnel Director of the Department of Education of the Commonwealth of Puerto Rico. Plaintiff is an employee of the Department. During the latter part of 1976 Plaintiff was promoted on a non-permanent basis to the position of Elementary School Director III. He held, and performed duties at this position during the 1976-1977 school year. On June 9, 1977[1] Plaintiff was notified that his

[1] Although this notification is dated May 31, 1977 Plaintiff has noted at the bottom of this letter that it was not received by him until June 9, 1977. Defendants do not contest this date and we assume no dispute to be present on this point. See Attachment A to the complaint.

non-permanent appointment would expire at the end of that school year and that he was being reassigned to his previous permanent position.[2] This notice stated that the demotion would be effective August 8, 1977, see note 2. Shortly after receipt of this notice, on June 5, 1977, Plaintiff replied his disagreement and noted he would comply, but stated he would refer the matter to the Teachers Association for the "necessary action."[3] At the start of the 1977-1978 school year Plaintiff returned to his demoted tenured position where, according to the complaint, he labors to this date. Plaintiff claims the demotion was motivated entirely by political considerations and is therefore violative of several constitutional provisions. He invokes a cause of action under federal law, 42 U.S.C. §1983, and by virtue of this Court's pendent jurisdiction under local law, 18 L.P.R.A. §211,214, 249(e).

Defendants' Motion to Dismiss is premised on the argument that Plaintiff's cause of action accrued on June 9, 1977, date of the notice of reassignment, and that a complaint filed

[2] This notice reads in full:

"Dear Mr. Allende:

As you know, the appointment to the position you now occupy expires with the termination of the present school year.

"While we appreciate your collaboration we remind you that you are correspondingly reinstated to the position in which you have tenure in the system. To this effect our Personnel Division is proceeding to reinstate you to position number 0126 which is elementary school teacher in the Loiza School District effective August 8, 1977." (Translation ours). See Attachment A to the Complaint.

[3] The reply reads:

"Dear Mr. Secretary:

"I have received a communication from the Department in your name dated May 31, 1977, signed by Mr. Julio Cintron Lopez, Director of the Personnel Division. I am not in agreement with your decision.

"To this effect I have remitted copy of the same to the Puerto Rico Teachers Association so that said organization may instruct its legal division to take necessary action.

"Meanwhile I shall comply with the Order sent by you." (Translation ours). See Attachment B to the Complaint.

on January 10, 1979[4] is therefore time barred. On the other hand Plaintiff's opposition retorts that the correct accrual date is August 8, 1977, the date the demotion became effective.[5] Because both parties concede, as they must,[6] that this action is governed by the one year time limitation set out in Article 1868(2) of the Civil Code of Puerto Rico; 31 L.P.R.A. §5298(2), the issue, simply stated, is when the one year time period commenced running. If we accept either June 9, 1977, or June 15, 1977,[7] i.e., the date of the notice of reassignment or the date of Plaintiff's protest note, this action is without a doubt time barred. Conversely, if we accept August 8, 1977, the date the reassignment became effective, or Plaintiff's alternate argument that the action has yet to accrue, the action must be considered timely.

Although the limitations period is borrowed from local law, see fn. 6 supra, the question of when a federal action ac-

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[4] The complaint in the present case was filed on January 10, 1977. However, because he was part of the purported class set out in the complaint filed in Civil Number 78-1156 on June 19, 1978, this earlier class action suit tolled the limitations statute for all members of the class irrespectively of whether the class was later certified or not. See: *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1074). Therefore, Plaintiff's suit is timely only if it accrued within one year of June 19, 1978.

[5] Although not fully developed, an alternate argument advanced by Plaintiff is that this cause of action has yet to accrue because he is still functioning at his demoted position and is therefore still suffering from discrimination.

[6] See: *Gual Morales* v. *Hernandez Vega*, 579 F. 2d 667, 679 (C.A. 1, 1978); *Hernandez Jimenez* v. *Calero Toledo*, 576 F. 2d 402, 404 (C.A. 1, 1978); Ramirez de Arellano v. *Alvarez de Choudens*, 575 F. 2d 315, 318-319 (C.A. 1, 1978); *Hernandez del Valle* v. *Santa Aponte*, 575 F. 2d 321, 322 (C.A. 1, 1978); *Graffals* v. *Garcia*, 550 F. 2d 687 (C.A. 1, 1977).

[7] There is a dispute between the parties as to whether the letter of protest, see fn. 4 supra, tolled the running of the statute of limitations. Because the determinative date is June 19, 1978, see fn. 4, supra, this argument is immaterial. Even if this note did toll the limitations period the complaint would still be untimely.

crues is one to be determined by federal law. *Bireline* v. *Seagondollar*, 567 F. 2d 260, 263 (C.A. 1, 1977); *Briley* v. *California*, 564 F. 2d 849 (C.A. 9, 1977); *Cox* v. *Stanton*, 529 F. 2d 47 (C.A. 4, 1975), cf. *United States* v. *Kubrick*, _____ U.S. _____ (November 28, 1979) 48 U.S.L.W. 4030 (1979). "Federal law holds that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action."[8] *Cox* v. *Stanton*, supra, p. 50; cited at *Michell* v. *Hendricks*, 431 F. Supp. 1295, 1298 (E.D.Pa. 1977); cf. also *Urie* v. *Thompson*, 337 U.S. 163, 169-70 (1949). In essence, Defendants' theory is that Plaintiff knew of the injury from receipt of the notice of reassignment on June 15, 1977 while Plaintiff's position is that there was no "actual injury", and therefore no basis for an action until the reassignment became effective on August 8, 1977.

Our reading of the material before us reveals that: first, no claim is made by Plaintiff that he did not know, or did not have reason to know of the alleged political motivations behind the June 9, 1977 notice of reassignment.[9] Second, there is no allegation that Defendants fraudulently concealed from Plaintiff their injury causing acts. Cf. *Hernandez Jimenez* v. *Calero, Toledo*, 576 F. 2d 402, 404 (C.A. 1, 1978); see also: *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396-97 (1946). Third, no conspiracy of any kind is alleged. See *Gual Morales* v. *Hernandez Vega*, 579 F. 2d 677 (C.A. 1, 1979); *Hernandez Jimenez* v. *Calero Toledo*, supra; *Kader* v. *Milbury*, 549 F. 2d 230 (C.A. 1, 1977).

Plaintiff's position is instead premised on the argument that after receipt of the official notice of reassignment he could not bring suit because there was still lacking a necessary

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[8] This is similar to the Puerto Rican rule on accrual in this type of action, see: 31 L.P.R.A. §5298(2).

[9] Indeed the fact that identical responses were made by over one hundred similarly affected persons would seriously discredit such a claim. See complaint of June 19, 1978 and Amended Complaint of October 5, 1978 in Civil Number 78-1156.

element for a valid cause of action, viz., the actual harm. This is not correct. Depending on the circumstances, even the "threat of dismissal" for political motivations is enough to trigger a civil rights cause of action and entitlement to immediate specific relief. *Elrod* v. *Burns*, 427 U.S. 347, 359 (1976); see also: *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 235-36 (1977); cf. *Board of Regents* v. *Roth*, 408 U.S. 564,568 (1972). We realize that the relief that may have been requested, or that may have been available, at any point prior to August 8, 1977 would certainly vary from what would be the case after this date. But surely if Plaintiff's claim had any merit, temporary injunctive relief would have been available, *Elrod* v. *Burns*, supra, 373-74, and certainly this would have mitigated any damages that would have been realized. In this sense much of what the complaint seeks in the way of relief, *viz.*, reinstatement, back pay and damage amounts, would have been lessened if not mooted.

Further, it is not entirely accurate to characterize an official notice of reassignment as a "threat of future harm, not yet realized",[10] Plf's Memorandum of Law, January 24, 1980, p. 9, nor is it fair to say that this situation only involves ". . . fears from another's possible conduct. . . ." Plf's Memorandum of Law, January 24, 1980 p. 6, or only "knowledge that their civil rights will be attacked in the future", Plf's Memorandum, October 25, 1979, p. 13. An official notice that one has been demoted coupled with knowledge of the reasons for the demotion is harm realized. The official notice of reassignment cannot, under any guise, be viewed as an indication that Plaintiff's right will be attacked in the future. If Plaintiff's allegations of political motivation are true, as we construe them to this point,[11] on receipt of the notice his

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[10] Citing from Prosser, *The Law of Torts*, (4th ed. 1971) p. 143.

[11] The limitations issue has been raised by Defendants in a Motion entitled "Motion To Dismiss and/Or For Judgment On The Pleadings." There is some question as to how this Motion should be procedurally treated. We do note that "matters outside the pleadings have been presented" and considered in our disposition of this Motion. See Rule 12 (b), F.R.Civ.P. However, we make clear that

rights were violated then and there and a "complete and present cause of action existed." *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941); Cf. *Blake* v. *Town of Delaware*, 441 F. Supp. 1189, 1199-1200 (D. Del. 1977).

We admit Plaintiff's position finds superficial support in cases cited by him in his argument: *Morelock* v. *N.C.R. Corp.*, 586 F. 2d 1096 (C.A. 6, 1978); *Jackson* v. *Alcan Sheet & Plate*, 462 F. Supp. 82 (N.D.N.Y. 1978); *Taliaferro* v. *Willett*, 411 F. Supp. 595 (F. D. Vir. 1976). But see also: *Bireline* v. *Seagondollar*, 567 F. 2d 260 (C.A. 4, 1977). Greater scrutiny, however, would reveal crucial differences between this authority and the case at bar. For example, in *Morelock* v. *N.C.R. Corp.* supra, an action was brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621, *et seq.* by employees who had lost their jobs by a reduction in work force through the operations of the employer's seniority system. The employer argued that the action was timebarred on the grounds that Plaintiffs' cause of action accrued on the date the seniority system was adopted by the company. Plaintiffs retorted that the effective accrual date was the date when they were in fact laid off. Because the employer's argument signified that an employee hired "more than three years[12] after the implementation of a seniority system could never challenge its validity," the Court specifically held that: "An employee's cause of action for an alleged act of age discrimination caused by a discriminatory seniority system, does not accrue until his employment opportunities are adversely affected by the application to him of the provisions

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we have made no findings of fact in our disposition of this Motion but have accepted them as presented by the parties. In any event the limitations issue as presented here is one of dates and as to these there is no dispute. We find none of the constraints of either Rule 12 or 56 as precluding our present conclusion.

[12] Under the A.D.E.A. three years is the maximum statutory time period that may elapse before an action becomes timebarred. 29 U.S.C. 255.

of that seniority system." *Id.* at p. 1103. The facts before us are noticeably different from those before the Court in *Morelock*.

Nor is *Jackson* v. *Alcan Sheet & Plate*, supra, much authority for Plaintiff's position. In this action, also involving an A.D.E.A. claim, the Plaintiff was first notified of his dismissal, and a few days later actually ceased working. After termination of his employment, however, he continued to press for reinstatement before the corporate headquarters of his employer and a state administrative agency. The Court's entire analysis centers on whether the action accrued on the date he ceased working or whether his subsequent attempts to gain reinstatement had tolled the limitations period. In choosing the dismissal date as the date of accrual the Court rejected the argument that continuing contacts could be considered as suspending the limitations period insofar as they are not necessarily determinative of when a Plaintiff was in fact adversely affected. Because the case at bar involves a reassignment which is to become effective from one school year to the next and because Plaintiff here was notified after the preceding school year had terminated, the *Jackson* rationale detracts from, rather than enhances, Plaintiff's position. Cf. *Bonham* v. *Dresses Industries, Inc.*, 424 F. Supp. 891 (W.D. Pa. 1976); *Davis* v. *R.J.R. Foods, Inc.*, 420 F. Supp. 930 (S.D.N.Y., 1976), aff'd. 556 F. 2d 555 (C.A. 2, 1977). The fact that an ongoing relationship continued between plaintiff and defendant does not affect the fact that plaintiff knew he was injured on a date certain.

The third case, *Taliaferro* v. *Willett*, supra is more factually analogous to the case at bar. Here suit was brought by a college professor attacking an alleged unconstitutional notice of retirement. She had been notified by letter in early June 1973 of her retirement to become effective at the end of that school year, June 30, 1973. The issue here was also when had

the action accrued; when she was notified or when it became effective. The Court chose the latter, reasoning:

> "While an aggrieved party may contest termination procedures before the actual termination is effective, see *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 568 (1972), such a party also has an election to treat an employment contract as in force until actual termination of the employment relationship occurs in hopes of negotiating a reconciliation without judicial intervention. If such an election is made, and attempts at settlement fail, the cause of action accrues at the time the employment relationship ceases. In the instant case, the Plaintiff elected to treat the employment relationship as continuing until actually terminated, and pressed for reconsideration of the decision by College officials. Accordingly, her cause of action can be said to have accrued on the date of her release, . . ." *Id.* p. 596-97.

Here the Court found that a cause of action could not accrue at least until the school year had ended and the employment contract could be considered terminated. Compare our holding today in *Ortiz Rivera* v. *Chardon et al.*, Civil Number 78-1156; cf. also the situation in *Jackson* v. *Alcan Sheet & Plate*, discussed above. But in the case at bar the notification came after, and not before, the school year had ended. Moreover, it involves a reassignment and not a dismissal. After Plaintiff was officially notified there was no contract which he could elect to treat as "in force." Any such contractual claims ceased with the end of the preceding school year. After these events Plaintiff could have no reasonable expectations that he would function at the Directors position at the beginning of the new school year. To say otherwise is to hold that a limitations period is tolled merely by a plaintiff's unilateral belief that his wrong or harm will be reversed or abated in the future. *Taliaferro* clearly does not stand for this proposition and we fail to find any authority that would command such a conclusion.

Further, we find no merit in Plaintiff's argument that the cause of action has failed to accrue because he is still suffering from the effects of the discrimination. We have read the

complaint carefully. At most all that is claimed is that Plaintiff still labors at his demoted position. See complaint par. 12. "To state such a continuing violation . . . a complaint must indicate that not only the injury, but the discrimination, is in fact ongoing. . . . A continuing violation is not stated if all that appears from the complaint is that the plaintiff continues to suffer from the ongoing effects of some past act of discrimination." *Goldman* v. *Sears, Roebuck & Company*, _____ F. 2d _____ (C.A. 1, October 25, 1979); cf. also: *United Airlines* v. *Evans*, 431 U.S. 553 (1977); *Daughtry* v. *King's Department Stores*, _____ F. 2d _____ (C.A. 1, November 8, 1979). "[T]he mere failure to right a wrong and make plaintiff whole cannot be a continuing wrong which tolls the statute of limitations, for that is the purpose of any lawsuit and the exception would obliterate the rule." *Fitzgerald* v. *Seamans*, 553 F. 2d 220, 230 (C.A.D.C. 1977).

Lastly, we recognize with Plaintiff that Puerto Rico's statute of limitations may be shorter than most such statutes, *Templeman* v. *Baudhin Yacht Harbour, Inc.*, _____ F. 2d _____ (C.A. 1, November 29, 1979). But the effect of such a statute is not governed by its length. "Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suits inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests prohibiting the prosecution of stale ones." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 463-64(1975). And while Plaintiff's statement that his claim is not yet "stale", may have considerable merit to it, this is a value judgment where §5298(2), 31 L.P.R.A., has dictated otherwise. "It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims." *United States* v. *Kubrick*, supra., Slip Opinion p. 13.

For all the above cited reasons we find that a cause of action for demotion in public employment for political reasons accrues when the employee is given official notice of his demotion and he is aware of the illegal motives behind such

action. In the present action we are forced to conclude that the one year time limit had elapsed before the present action was filed and it is therefore, timebarred. The Complaint is accordingly, DISMISSED.

The Clerk of the Court shall enter Judgment accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 2nd day of April, 1980.

/s/ JUAN R. TORRUELLA
Juan R. Torruella
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Number: 79-71

ANGEL LUIS ALLENDE VELAZQUEZ *Plaintiff*

v.

CARLOS CHARDON, *et al Defendants*

ORDER

(September 16, 1980)

Plaintiff has filed a Motion for Reconsideration of our Order which denied the Motion to Vacate Judgment pursuant to Rule 60(b)(6), F.R.C.P. This Motion has been duly opposed.

We consider this Motion as one to vacate judgment and assuming that we can entertain it pursuant to the ruling of the Court of Appeals for the First Circuit in *Commonwealth of Puerto Rico, et. al.* v. *The S.S. Zoe Colocotroni, et. al.*, 601 F. 2d 39 (C.A.1, 1979), Plaintiff's Motion is accordingly DENIED. See *U.S.* v. *Kubrick*, _____ U.S. _____ (1979); *Lavellee* v. *Listi*, 611 F. 2d 1129 (C.A. 5, 1980); *Ramirez de Arellano* v. *Alvarez de Choudens, etc.*, 575 F. 2d 315 (C.A.1, 1978); *Bireline* v. *Seagondollar*, 567 F. 2d 260 (C.A. 4, 1977), cert. den., _____ U.S. _____ (1979); *Cox* v. *Stanton*, 529 F. 2d 47 (C.A. 4, 1975).

IT IS SO ORDERED.*

In San Juan, Puerto Rico, this 12th day of September, 1980.

/s/ JUAN R. TORRUELLA
Juan R. Torruella
U.S. District Court Judge

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* Identical orders were issued by the District Court on the same date in the following additional cases:

PLAINTIFF	CIVIL NO.
Diaz Maldonado	79-225
Nieves Rivera	79-195
Sanchez de Negron	79-174
Tarafa Gonzales	79-222
Velazquez Nieves	79-80
Velazquez Concepcion	79-168

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NUMBER: 79-186

JOSE R. MUNOZ RIVERA

Plaintiff

v.

CARLOS E. CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico

and

OSCAR L. RAMOS, individually and as Assistant Secretary of Public Education in Charge of Personnel of the Commonwealth of Puerto Rico

Defendants

Decision And Order

In *Ortiz Rivera* v. *Chardon,* Civil Number 78-1156; *Allende Vazquez* v. *Chardon,* Civil Number 79-71; *Garcia Rosado* v. *Chardon,* Civil Number 79-74[1] we found that an identical cause of action to the one presented in this case accrued, for limitations purposes, when the Plaintiff received an official notification of reassignment and that thereafter Plaintiff had one year in which to initiate suit. Having examined the present record we find no reason why the analysis set out in these other analogous cases would not be equally applicable to this case.

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[1] The same counsel represent all parties in these related suits.

Because the Plaintiff in the present case had notice of action against him before June 14, 1977, see Attachments A and B to the Complaint, a complaint filed on June 19, 1978[2] would be untimely and the complaint must be, and is hereby DISMISSED.

The Clerk of the Court shall enter Judgment accordingly

IT IS SO ORDERED.*

In San Juan, Puerto Rico, this 21st day of April, 1980.

/s/ JUAN R. TORRUELLA
Juan R. Torruella
U. S. District Court Judge

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[2] See: *Allende Vazquez* v. *Chardon*, supra, at fn. 4.

* Virtually identical decisions and orders — differing in material respects only as to recitals of the date plaintiff received notice of the employment action — were issued by the District Court in the following additional cases:

ORDER DATE	PLAINTIFF	CIVIL NO.	NOTICE DATE
4/21/80	Diaz Maldonado	79-225	6/14/77
4/21/80	Nieves Rivera	79-195	6/15/77
4/21/80	Sanchez de Negron	79-174	6/15/77
4/21/80	Ortiz Ortiz	79-207	6/15/77
4/21/80	Tarafa Gonzales	79-222	6/15/77
4/21/80	Rosado Acevedo	79-201	6/13/77
4/21/80	Velazquez Nieves	79-80	6/14/77
5/28/80	Velazquez Concepcion	79-168	6/8/77

Civ. No. 79-324

CLAUDIO AVILES NAVARRO, *Plaintiff*

v.

CARLOS CHARDON, Individually and as Secretary of Public Education of the Commonwealth of Puerto Rico

and

OSCAR RAMOS, Individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico, Defendants.

United States District Court,
D. Puerto Rico.

Nov. 14, 1980.

OPINION AND ORDER

GIERBOLINI, DISTRICT JUDGE.

The plaintiff instituted this civil rights action under 42 U.S.C §1983, 28 U.S.C. §§2201, 2202, and by virtue of this Court's pendant jurisdiction under local law, 18 LPRA §§211, 214, 249e, alleging a work demotion based on political considerations.

Defendants in this suit are the Secretary and the Personnel Director of the Department of Education of the Commonwealth of Puerto Rico. Plaintiff is a tenured employee of the Department as a Secondary Teacher. During the month of September, 1975 he was reassigned on a non-permanent basis to the position of Second Unit Director III and in October, 1976 he was reclassified to Director IV. He performed at those positions during the 1975-1976 and 1976-1977 school years. Between the 13th and 15th of June, 1977 plaintiff was notified that his non-permanent appointment would expire at the end of that school year[1] and that he would be reassigned

[1] A school year is defined in 18 LPRA Section 77 as:

"The school year shall in no case exceed ten months and shall be as much less as the Secretary of Education shall direct; Provided, that the school year shall in no case be less than eight

to his permanent position as a secondary teacher in the Quebradillas District effective the beginning of the next school year.[2] On August 12, 1977, in a letter to the Honorable Carlos Chardon, plaintiff informed his disagreement and expressed that although he would comply, he would refer the matter to the Teachers' Association in order for its legal division to take the necessary action.[3] At the beginning of the 1977-78 school year, Plaintiff returned to his tenured position which, according to the complaint, he still holds to this date. Plaintiff claims his return to his tenured position was a demotion politically motivated and, therefore, violative of his constitutional rights. We are not ready at this time to determine whether in fact and in law plaintiff's return from his non-permanent to his permanent position was a demotion or not, but for the purpose of this Opinion, we assume without deciding, that it was.

Defendants have filed a Motion to Dismiss premised on the argument that Plaintiff's cause of action accrued on or about June 15,1977, date of the notice of reassignment, and that a complaint filed on January 26, 1979[4] is hence time-barred by the statute of limitations. On the other hand, Plain-

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months; And provided, further, That the school director in the school district may extend the school year beyond the limit fixed by the Secretary of Education, but not to exceed the maximum limited herein provided for. In all cases where such extension of the school year is made, it shall be wholly at the expense of the district authorizing it."

[2] Although the notification is dated May 25, 1977 Plaintiff has noted at the bottom of this letter that it was not received by him until the dates herein indicated. See Attachment A to the Complaint.

[3] See Attachment B to the Complaint.

[4] The complaint in the present case was filed on January 26, 1979. However, because he was part of the purported class set out in the complaint filed in Civil Number 78-1156 on June 19, 1978, this earlier class action suit tolled the limitations statute for all members of the class irrespectively of whether the class was later certified or not. See: *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). Therefore, Plaintiff's suit is timely only if it accrued within one year of June 19, 1978.

tiff's position is that the correct accrual date is August 1, 1977, the date the alleged demotion became effective.[5]

The time of accrual of a tort action in the Commonwealth of Puerto Rico under 31 LPRA 5298(2) is similar to the federal law since Section 5298 reads that: "the actions to demand civil liability . . . or negligence prescribe in one year 'from the time the aggrieved person had knowledge thereof' ". See *Catala* v. *Coca-Cola,* 101 DPR 608 (1973); *Comunidad Agricola Bianchi* v. *Trib. Superior,* 99 DPR 376 (1970).

[1] As a general rule, where a federal statute creates a wholly federally protected right, but no provision is made for a specific statute of limitations, the state statute of limitations for analogous types of actions is to be applied. *Board of Regents of the Univ. of New York* v. *Mary Tomanio,* 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980). Both parties concede that this action is governed by the one-year statute of limitations period provided by 31 LPRA Section 5298(2). See: *Gual Morales* v. *Hernandez Vega,* 579 F.2d 677, 679 (1 Cir. 1978); *Hernandez Jimenez* v. *Calero Toledo,* 576 F.2d 402, 404 (1 Cir. 1978); *Ramirez de Arellano* v. *Alvarez de Choudens,* 575 F.2d 315, 318-319 (1 Cir. 1978).

However,the problem to be solved is the time of accrual of the present cause of action and accordingly, when the one-year time period commenced running. If we accept that any day between the 13th and 15th of June, 1977, i. e., the date of the notice of reassignment, this action is without doubt time barred. Conversely, if we accept August 1,1977, or August 12, 1977, i. e. the date the reassignment became effective or the date of Plaintiff's protest letter [6] or Plaintiff's alternate argument that the action has yet to accrue, the action must be considered timely.

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[5] Plaintiff advances an alternate argument that this cause of action has yet to accrue because he is still employed at his demoted position and is therefore still suffering from discrimination.

[6] There is some dispute between the parties as to whether the letter of protest tolled the running of the statute of limitations.

[2,3] While the time limitation itself is borrowed from state law, the federal law determines the time of accrual of a right of action. *Bireline* v. *Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), Cert. den. 444 U.S. 842, 100 S.Ct. 83, 62 L.Ed. 2d 54 (1979); *Cox* v. *Stanton*, 529 F.2d 47, 50 (4th Cir. 1975), *Briley* v. *State of California*, 564 F.2d 849, 854 (9th Cir. 1977), cf. *United States* v. *Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed2d 259 (1979). Federal Law holds that the time of accrual is when plaintiff knows or has reason to know the injury which is the basis of the action.[7] *Cox* v. *Stanton, supra*, at 50 citing *Young* v. *Clinchfield R.R. Co.*, 288 F.2d 499, 503 (4th Cir. 1961); *Lavellee* v. *Listi*, 611 F2.d 1129, 1131 (5th Cir. 1980).

[4] In the instant case, plaintiff adduces that the official notice of reassignment constituted a threat of future harm not yet realized and that their suit became actionable only upon their demotion, the time at which they suffered a real injury. We disagree

This notice was not a mere threat of future harm not yet realized.[8] This was clearly defendants' final position and not just a threat. A threat can be defined as an expression of intention to inflict harm or injury on another in the future, being such occurrence uncertain. cf. *Heywood* v. *Tillson*, 75 Me. 225. Defendants' letter was a notice of his final determination, with prospective effects indeed, but undoubtedly not just an uncertain promise to do something in the future. At this time defendant had all the critical facts and all the necessary knowledge of injury, breach, duty and damages. No

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[7] This is analogous to the Puerto Rican rule on accrual governing this type of action; see: 31 LPRA Section 5298(2).

[8] The letter stated: "As you know, your actual position appointment expires at the end of the present school year . . . (O)ur Teaching Personnel Division is proceeding to reinstate you at your position . . . as secondary teacher in the Quebradillas School District, effective at the beginning of the next school year." (Our translation)

more is needed to trigger the start of the one year limitation, within which the action must filed or lost forever. Cf. *Stoleson* v. *U.S.(7 Cir.) 629 F.2d 1265 (1980).*

Accordingly, we find that upon the receipt of the official notice of reassignment, whereby through competent authority plaintiff knew the alleged harm, a complete cause of action existed and it should have been filed within the next year. Our conclusion is buttressed by *Bireline* v. *Seagondollar, supra*, where the Circuit Court upheld the district judge's decision which states as follows:

> "On May 19, 1970, the Plaintiff was given a termination notice by Chancellor Caldwell and that notice was intended to be and was in fact a final notice of termination of employment. On or before May 19, 1970, I find as a fact that plaintiff's cause of action accrued and that she could have at any time thereafter sued . . . with regard to the termination of her employment . . ."

Even though plaintiff herein has tendered several cases in support of his argument, i. e. *Morelock* v. *N.C.R. Corp.*, 586 F.2d 1096 (6th Cir. 1978); *Jackson* v. *Alcan Sheet & Plate*, 462 F.Supp. 82 (D.C.N.Y. 1979); *Taliaferro* v. *Willett*, 411 F.Supp. 595 (ED Va.1976) upon close examination of these authorities we find that they can be easily distinguished from the case at bar and thus, merit no discussion here, with the exception of the *Taliaferro* case.

The *Taliaferro* case, *supra*, presents a factual situation which is analogous to the case before us. There, Mrs. Taliaferro, a college professor, instituted a civil rights action on a claim of an allegedly unconstitutional notice of retirement from her position as a tenured teacher. She had been notified of her retirement by letter from the Dean early in June 1973 to become effective at the end of that school year, June 30, 1973. The controversy therein, as in the instant case,

was when had the action accrued; when she was notified or when it became effective. The Court selected the latter, concluding:

> "While an aggrieved party may contest termination procedures before the actual termination is effective, see *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 568, 92 S.Ct. 2701, 2704, 33 L.Ed.2d 548, 555 (1972), such a party also has an election to treat an employment contract as in force until actual termination of the employment relationship occurs in hopes of negotiating a reconciliation without judicial intervention. If such an election is made, and attempts at settlement fail, the cause of action accrues at the time the employment relationship ceases. In the instant case, the plaintiff elected to treat the employment relationship as continuing until actually terminated and pressed for reconsideration of the decision by College officials. Accordingly, her cause of action can be said to have accrued on the date of her release. . . " Id. p. 596-597.

The Court figured that her cause of action could not accrue until the school year had ended and the employment contract could not be considered terminated. However, the case at bar involves a reinstatement, not a dismissal. After plaintiff received official notice that his nonpermanent appointment would expire at the end of that school year and that he was being reassigned to his previous permanent position, plaintiff could have no reasonable expectations that he would occupy the Director's position at the beginning of the next school year. At that moment plaintiff's cause of action accured and the one year period began running.

Moreover, we refuse to follow the *Taliaferro* rationale because of its inherent contradictions. While it admits that an aggrieved party may contest termination procedures before the actual termination is effective, it also states that the cause of action can accrue at the time the employment relationship ceases. Undoubtedly, if the cause of action is ripe before the

actual termination of the relationship, then it follows that the time of accrual preceeds the termination date, i. e. upon receipt of the notice of dismissal.[9]

As to the case at bar, we find no merit in plaintiff's assertions to the effect that the cause of action has failed to accrue because he is still suffering from the effects of discrimination. Plaintiff's only allegation in relation to this point is that he still labors at his demoted position. See complaint, par. 12. Nevertheless, "to state such a continuing violation . . . a complaint must indicate that not only the injury, but the discrimination is in fact ongoing . . . A continuing violation is not stated if all that appears from the complaint is that the plaintiff continues to suffer from the ongoing effects of some past act of discrimination." *Goldman* v. *Sears, Roebuck & Company,* 607 F.2d 1014, 1018(1st Cir.1979); cf. also *United Air Lines Inc.* v. *Evans,* 431 U.S. 553,558,97 S.Ct.1885,1889,52 L.Ed.2d 571 (1977). Accordingly, "the mere failure to right a wrong and make plaintiff whole cannot be a continuing wrong which tolls the statute of limitations, for that is the purpose of any lawsuit and the exception would obliterate the rule." *Fitzgerald* v. *Seamans,* 553 F.2d 220, 230 (D.C.Cir.1977).

[5] Lastly, we turn to consider plaintiff's argument that the letter of protest dated August 12,1977[10] tolled the running

[9] But note that in the case before us, different from *Taliaferro,* there were never settlement conversations of negotiations for reconciliation.

[10] It reads:

"Dear Mr. Secretary:

"I have received a communication from the Department in your name dated May 25, 1977, signed by Mr. Julio Cintron Lopez, Director of the Personnel Division. I am not in agreement with your decision.

"To this effect I have remitted copy of the same to the Puerto Rico Teachers' Association so that said organization may instruct its legal division to take the necessary action.

"Meanwhile, I shall comply with the Order sent by you." (Translation ours)

See Attachment B of the Complaint

of the statute of limitations. In *Graffals* v. *Garcia,* 550 F.2d 687 (1st Cir. 1977) our Court of Appeals affirmed the district court's decision in 415 F.Supp. 19 (D.C.P.R.1976) establishing that: "The tolling of the one year period provided by Section 5298(2) is governed by P.R.Laws Annotated, Title 31, Section 5303, which states: Prescription of actions is interrupted by their institution before the Courts, by extrajudicial claim of the creditor, and by any act of acknowledgement of the debt by the debtor." In interpreting the phrase "their institution before the courts" this Court ruled that said action must be the one exercised, not another one that is more or less analogous.

It was made clear that by referring to "their institution" the statute appears to state that it is the commencement of the action at bar and not some other action which tolls the period of limitation. This doctrine was reaffirmed in *Ramirez de Arellano* v. *Alvarez de Choudens,* supra, where the Circuit Court of Appeals for the First Circuit held that: "We are unwilling to depart from the interpretation of Section 5303 announced in *Graffals,* that to toll the statute the action must be the case at bar and not merely a somewhat related action arising from the same facts."

But clearly, plaintiff's protest letter cannot arguably be considered an extrajudicial claim. In *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d 321, 323 (1st Cir.1978) the Court found that an extrajudicial demand in the form of letters did not give defendant fair notice "that he might be called upon to defend a damages suit with different issues not applicable to a suit for injunctive relief." Thus, "these letters did not toll the one year statute of limitations."

In view of the foregoing, we are forced to conclude that plaintiff's protest letter objecting to the termination of his contract and his reinstatement to his tenured position did not toll the statue of limitations. The letter merely notified the co-defendant, Secretary of Education, that the notice of termination was being forwarded to the Teachers' Association legal

division "to take the necessary action." (Translation ours) Certainly, plaintiff gave no indication of any kind of financial obligation on the part of defendant.

We find that a cause of action for a demotion in public employment for political motives accrues when the employee is given such official notice and he is aware of the illegal motives behind such action. In the present action the one year time limit had elapsed before the present action was filed and it is therefore, time-barred. The Complaint is hereby dismissed.

The Clerk of the Court shall enter judgement accordingly.

IT IS SO ORDERED.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL 79-181

CARMEN ROMAN DE MOLINA *Plaintiff*

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico *Defendants*

OPINION AND ORDER

(Filed December 8, 1980)

On November 14, 1980 we issued an Opinion and Order in the case of *Claudio Aviles Navarro* v. *Carlos Chardon* and *Oscar Ramos*, Civil Number 79-324, dismissing the cause of action therein after reaching the conclusion that the case was barred by the statute of limitations.

In the present case, arising from the same factual situation, the letter notifying plaintiff of the final action by the Secretary of Education of Puerto Rico, Mr. Carlos Chardon, was received by plaintiff on or before June 16, 1977. The Complaint was filed on January 15, 1979. However, because plaintiff herein was part of the purported class set out in the complaint filed in Civil Number 78-1156 on June 19, 1978, this earlier class action suit tolled the limitations statute for all members of the class irrespectively of whether the class was later certified or not.

The issue herein is identical to the one we decided in the case of *Claudio Aviles Navarro*. Therefore, the analysis of the

law and the conclusions we reached therein are equally applicable to this case.

WHEREFORE, on the strength of reasoning of the aforementioned case, we conclude that the cause of action in this case is barred by the statute of limitations; consequently, defendant's motion to dismiss is granted and this case is hereby dismissed.

The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.*

San Juan, Puerto Rico, this 2nd day of December, 1980.

/s/ GILBERTO GIERBOLINI
Gilberto Gierbolini
United States District Judge

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* Virtually identical opinions and orders — differing in material respects only as to recitals of the date plaintiff received notice of the employment action and the date plaintiff's complaint was filed — were issued by the District Court on the same date in the following additional cases:

PLAINTIFF	CIVIL NO.	NOTICE DATE	COMPLAINT DATE
Santiago de Orta	79-184	6/13-6/14/77	1/15/79
Anguita de Rios	79-163	6/6-6/10/77	1/15/79
Rosado Sanchez	79-84	6/6/77	1/10/79
Cintron Santana	79-205	6/2/77	1/15/79
Perez Ramirez	79-172	6/6/77	1/15/79
Cacho Collazo	79-78	6/13/77	1/10/79
Guadalupe Garcia	79-217	6/7/77	1/15/79
Lopez de Ferra	79-187	6/3/77	1/15/79
Cruz Beltran	79-211	6/14-6/17/77	1/15/70
Cacho de Freytes	79-196	6/8/77	1/15/79

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NUMBER: 78-1156

JOSE ORTIZ RIVERA *Plaintiff*

v.

CARLOS E. CHARDON, individually as Secretary of Public Education of the Commonwealth of Puerto Rico

and

OSCAR L. RAMOS, individually and as Assistant Secretary of Public Education in Charge of Personnel of the Commonwealth of Puerto Rico, *Defendants*

DECISION AND ORDER

(Filed April 21, 1980)

This civil rights action is for a second time before us on Defendants' Motion for Summary Judgment. The facts are essentially outlined in our Decision and Order of November 24, 1979. However, for the sake of clarity and for purposes of analysis of the pending Motion we repeat and add to them below.

Plaintiff is a high school teacher in Orocovis, Puerto Rico. It is a position in which he has tenure. During the 1976-1977 school year he served as Director of Schools in Orocovis. The evidence on record reveals that this appointment was subject to renewal on a year to year basis according to the recommendations of his supervisors and the needs of the Department of Education.[1] On May 27, 1977 Plaintiff, both orally and through a written letter, requested from the

[1] See Defendants' Motion for Summary Judgment, August 15, 1978, Exh. 3, letter dated August 17, 1976 of Ramon A. Cruz, Secretary of Education, to Plaintiff.

Superintendent of Schools for the Orocovis District that he be retransferred to his former position as a social science high school teacher.[2] The present action, however, is premised on the contention that shortly thereafter he changed his mind about returning to his previous position as a teacher and wished to remain in the position of Director. See Plaintiff's Sworn Statement of September 20, 1978.[3] On June 21, 1977[4] he was officially notified that he would not be renewed in his position as Director. The letter so notifying Plaintiff of this fact reads:

> "Dear Mr. Ortiz Rivera:
>
> "As you know the appointment to the position you now occupy expires with the termination of the present school year.
>
> "While we appreciate your collaboration we remind you that you are correspondingly reinstated to the position in which you have tenure in the system. To this effect our Personnel Division is proceeding to reinstate you to position number 0129 which is as Secondary School Teacher in the Orocovis District effective at the commencement of the next school year."[5]

At the commencement of the 1977-1978 school year Plaintiff

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[2] This letter is part of the record before us. See Defendant's Motion for Summary Judgment, August 15, 1978, Exb. 2,, letter dated May 27, 1977 from Plaintiff to Mrs. Nelida Melendez de Ortiz. See also Sworn Statement of Plaintiff, Sept. 30, 1978.

[3] There is no documentary evidence to this effect other than Plaintiff's Sworn Statement. The reasons given by Plaintiff for not withdrawing the letter of May 27, 1977 or . ıbmitting a new one reflecting his changed feelings is that: (1) he did not believe the letter had any legal effect and (2) he had been informed that the decision not to renew him as a Director had already been made.

[4] This notice is dated June 10, 1977 but stamped as received on June 21, 1977. There is no dispute on this fact.

[5] Our translation. See Decision and Order of November 23, 1978 p. 3. This is Attachment A to the Complaint.

returned under protest to his previous position as a high school teacher. See Attachment B to the Complaint.

On June 19, 1978 a complaint was filed wherein Plaintiff alleged that Defendant's non-renewal of his contract as a Director was politically motivated in that he was not of the same political affiliation as the Secretary of Education and the higher officials within the Department. Defendants' first Motion for Summary Judgment was premised on the contention that the transfer was legal because Plaintiff had in effect initially requested it and as such their actions were only a response to this voluntary request. While noting that this was a plausible argument on the ultimate merits involved in this litigation we rejected it as falling short of the burden of proof placed on Defendant in this type of request for summary judgment. Where a plaintiff has alleged impermissible reasons for a dismissal or a transfer it is not sufficient on summary judgment that the defendant simply set forth permissible reasons for his actions. In this type of situation the Defendants had the burden not only of showing that a permissible factor could have motivated the transfer-demotion, but that no impermissible factor was involved. See: *Mt. Healthy City School District Board of Education* v. *Doyle*, 427 U.S. 274 (1972); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Mack* v. *Cape Elizabeth School Board*, 553 F. 2d 720 (C.A.1,1977). In the case at bar Defendants' supporting material was substantial with respect to the first part of this burden, but totally lacking with respect to the second part. Our review of the record reveals that it remains lacking on this point to this date.

Defendants' present Motion for Summary Judgment raises for the first time the claim that this cause of action is time barred. This Motion raises identical problems to those present in *Allende Vazquez* v. *Chardon, et al.*, Civil Number 79-71.[6] Our analysis and decision therein will control much of

[6] Ordinarily we would not cite or use as authority a holding found in an unpublished opinion, cf. Rule 14, Rules of the United States Court of Appeals for the First Circuit. However, no unfairness accrues in the present case since all parties in these related cases are represented by the same counsel.

the controversy present here. However, the different factual circumstances of these two cases requires that we dispose of these two cases separately, and consequently, differently. There is no dispute here as to either the limitations period that controls or the rule which determines when this limitations period accrues. See: *Allende Vazquez* v. *Chardon et al,* at pgs. 3, fn. 6;4. In spite of this both parties argue opposite ends as to exactly what date should be fixed as the date of accrual of Plaintiff's cause of action. These opposing views are set out as follows.

Defendants contend that the limitations period commenced to run on May 27, 1977. Defendants' take this date from Plaintiff's own Sworn Statement wherein he relates his conversation with the Superintendent of Schools for the Orocovis District. Said Statement reads in part:

> "That it is true that on or about May 27, 1977, I personally visited Mrs. Nelida Melendez de Ortiz, the Superintendent of Schools at Orocovis School District, and informed her, in writing, that I wished to return to my position of (sic) school teacher at high school level during the 1977-78 school year, position in which I had tenure;
>
> "That on said occasion Mrs. Melendez informed me that my position was not necessary since it had already been determined at the Department's level (sic) that I was going to be removed from the position of school director and was going to be assigned to my permanent position of school teacher;"

Defendants argue that because Plaintiff was orally informed on May 27, 1977 that "it had already been determined [that he] was going to be removed from the position of school drector" and reassigned to his previous position that this then is the date when Plaintiff "knew or had reason to know of his injury."

Plaintiff retorts that the date when his cause of action accrued was in August of 1977,[7] the date when the new school year started and he found himself out of a job as a school director. Under Plaintiff's argument it is at this point when he is in fact demoted and thus has suffered an "actual injury." Under Plaintiff's analysis the possibility or probability that an event might happen in the future is not sufficient to find that a right has been violated and thus to say that the computation of the time limit for the enforcement of that right began to run.

In *Allende Vazquez* v. *Chardon, et al,* supra, we were faced with the question of determining whether an identical cause of action accrued on the date the Plaintiff was officially notified that he was demoted or the date this demotion actually took effect, which was some time later. The factual framework now before us presents a third possibility: the date when Plaintiff was orally and unofficially informed that he would be reassigned. In *Allende Vazquez* we found the date of the official notice of reassignment controlled. The present case evinces no reason which would compel a different conclusion.

The rationale behind our holding in *Allende Vazquez* was, that after receipt of an official notice of reassignment, a Plaintiff who was aware of the impermissible reasons for the official action had a viable cause of action. In such a situation he could both seek and secure relief against the discrimination. However, applying the same reasoning to the case at bar we cannot draw the same conclusion. First, from the informal and unofficial information Plaintiff received in May, 1977 one could not conclude that Plaintiff lost all reasonable expectations that he would continue at his position. Second, and along the same lines, from the informal conversation one cannot conclude that Plaintiff was in fact demoted or reassigned.

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[7] No specific date in August is advanced in this record by Plaintiff as the date when classes officially commenced for the 1977-1978 school year.

Until he was informed officially Plaintiff had no reason to believe that he was demoted. Third, although even the threat of a politically motivated dismissal may have been sufficient to invoke a cause of action, see *Allende Vazquez*, at p. 5, it is unclear from the record before us whether at the May 27, 1977 conversation Plaintiff knew, or should have known, of the illegal motivations behind the decision to return him to his previous position.[8] The very fact that the object of this conversation was Plaintiff's contemplated voluntary return to his previous position is indicative of the contrary.

The above facts persuade us that our analysis in *Allende Vazquez* is equally applicable. The present type of cause of action accrues on the date Plaintiff is officially informed that he is being demoted and he is aware of the reasons for this demotion. It is at this point that there is present a "complete and present cause of action." *Rawlings* v. *Ray*, 314 U.S. 96,98 (1948). In the present case this occurred on June 21, 1977. Therefore, a complaint filed on June 19, 1978 would be timely.

Lastly, in the file before us we note "Defendants' Opposition to Plaintiff's Motion to Strike Affirmative Defenses", January 31, 1980. We do not, however, find that Plaintiff has herein filed a Motion to Strike affirmative defenses. In any event because these defenses are identical to those reviewed in *Garcia Rosado* v. *Chardon*, Civil Number 79-74, we see no reason why our disposition of this question therein should not control here also.

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[8] Other than Plaintiff's own Sworn Statement, Defendants present no other factual material to substantiate this point. Because this is an issue of fact which is disputed, and indeed on the present record must be resolved against the Defendants, we must bear in mind the limitations of a Motion of Summary Judgment.

For all the above cited reasons Defendants' Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

IN SAN JUAN, PUERTO RICO, THIS 21ST DAY OF APRIL, 1980.

JUAN R. TORRUELLA
/s/ JUAN R. TORRUELLA
U.S. DISTRICT COURT
JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NUMBER: 79-74

CARMEN GARCIA ROSADO *Plaintiff*

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico *Defendants*

DECISION AND ORDER

The present action is an offshoot of the class action filed under Civil Number 78-1156. Although the present complaint is filed by a different Plaintiff, under different-factual circumstances, the cause of action is an identical one. Succinctly, Plaintiff is teacher within the public educational system of Puerto Rico. Her complaint is predicated on claim that she was removed from her non-tenured temporary position within the system and demoted to her tenured permanent position because of political motivations. It is presently before us on Plaintiff's Motion to Strike affirmative defenses and Defendants' "Motion to Dismiss and/or Summary Judgment." Both Motions are duly opposed and extensively argued. We address each Motion separately.

MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

Defendants' Motion to dismiss is premised on the argument that the present complaint is timebarred under the applicable statute of limitations. An exact copy of this Motion and its accompanying Memorandum of Law, and the respec-

tive opposition thereto were filed in two similar cases: *Ortiz Rivera* v. *Chardon, et al.*, Civil Number 78-1156; *Allende Velazquez* v. *Chardon, et al.*, Civil Number 79-71.[1] In both cases we addressed, and disposed of, the legal arguments presently before us. After careful examination of the present case we find no reason why a different analysis other than that previously set out by us in *Ortiz Rivera* and *Allende Velazquez* would, or should, control the case at bar. Therein we specifically found that an identical cause of action was controlled by the one year time limitation set out in 31 L.P.R.A.s5298(2) and that this one year time period accrued when the dismissed or demoted plaintiff was given official notification of the Department's action and not when the subsequent school year commenced. This holding controls the case at bar.

The official notification of the reassignment is alleged to have been received by Plaintiff on July 5, 1977. See Attachments A and B to the Complaint. Because Plaintiff was a member of the purported class set out in *Ortiz Rivera,* Civil Number 78-1156, the crucial date is June 19, 1978.[2] The present action is therefore timely. We note that the letter of reassignment is dated May 31, 1977, and Defendants invoke it as the date of accrual. Nowhere do the Defendants contest or dispute that is was received on any date before July 5, 1977. Therefore, this is the date the Court will accept as the date the Plaintiff is first aware of her injury. However, Plaintiff will be required to file within ten (10) days a Sworn Statement attesting to the veracity of Attachment A and B to the Complaint.

MOTION TO STRIKE AFFIRMATIVE DEFENSES

The complaint filed herein was answered on March 30, 1979. Defendants' answer invokes fifteen affirmative defenses.

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[1] The parties in these cases are represented by the same attorneys involved in the present case. Because of this fact we see no impropriety with referring to, and adopting from, our reasoning in these related cases where applicable.

[2] See *Allende Valazquez, Civil Number 79-71, at p. 3, fn.4.*

Plaintiff's present Motion seeks to strike eleven of these defenses. We list the contested affirmative defenses below:

"1. The complaint fails to state an actual case or controversy between plaintiff and defendants cognizable in this Court.

"2. The complaint fails to state adequate statutory grounds to support the jurisdictional grounds alleged therein.

"3. The complaint fails to state specific facts adequate to support the jurisdictional grounds alleged therein.

"5. The complaint fails to state a federal cause of action against defendants upon which any relief may be granted by this Honorable Court.

"7. The controversy is limited to the interpretation of Commonwealth Law and presents no federal questions.

"8. Plaintiffs have not exhausted the administrative remedies available to them under Commonwealth Law and therefore cannot claim lack of due process.

"9. Plaintiff has not exhausted the judicial remedies available to them in the Commonwealth Courts and this Honorable Court should therefore abstain from entertaining the controversy prior to such exhaustion.

"10. Whether or not plaintiff had any right subject to due process protection of the Federal Constitution hinges upon the interpretation of Commonwealth Law which presents no federal question.

"11. The complaint fails to state facts showing that the circumstances of this case warrant the intervention of this Honorable Court in the administrative proceedings of the system of Courts of the Commonwealth of Puerto Rico.

"13. Any damage, if any, suffered by plaintiff as result of the acts complained of were the result in full or part of plaintiff's actions and failure to act.

"14. The doctrine of primary jurisdiction applies to this case and thus plaintiffs must first pursue the adminstrative remedy available to them.

The present factual circumstances in the instant case are such that we need not detain on this second Motion.

As hereinbefore stated, the present complaint concerns a claim of illegal political motivations behind a demotion within the Department of Education. In order for a plaintiff to state a viable federal cause of action the dismissal, demotion or reassignment involved must offend the Constitution or laws of the United States. A dismissal or demotion based on purely political reasons would offend the Constitution. *Branti* v. *Finkel,* 48 U.S.L.W. 4331 (March 31, 1980); *Elrod* v. *Burns,* 427 U.S. 347 (1976). Conversely, if the dismissal or demotion was not tainted by political motivations as alleged in the complaint, but rather was the result of other legitimate concerns of the Department of Education, then no recovery is possible, and more so, no cognizable federal claim is stated. Because the determination of whether a cause of action is stated is so intertwined with the ultimate determination on the merits it is evident that resolution of this issue is best left for that point in time where resolution of conflicting factual versions is proper.[3] Insofar as affirmative defenses numbers 1, 2, 3, 5, 7, 10 and 13 turn on the ultimate merits of the dispute to be resolved the Motion to Strike these must be denied.[4]

Defendants' affirmative defenses numbers 8, 9, 11 and 14 all relate to whether the existence of any avenues of administrative relief under Commonwealth Law preclude this Court from proceeding with the present suit. Stated another way, the question is whether the doctrine of exhaustion of remedies is applicable to the case at bar.

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[3] In this sense the Motion to Strike would not differ from a motion for summary judgment. The same reasons that make summary judgment an improper avenue of disposition at this time, see *Ortiz Rivera* v. *Chardon*, supra, also make the Motion to Strike an improper method of disposition.

[4] This ruling does not, of course, intimate any findings on the merits.

It is true that several courts[5] have required the exhaustion of administrative remedies before a civil rights action may be brought in a federal court. See gen: *Fuentes* v. *Roher*, 519 F. 2d 379 (C.A. 2, 1975); *Eisen* v. *Eastman*, 421 F.2d 560 (C.A. 2, 1969), cert. denied 400 U.S. 841 (1975); *Blanton* v. *State University of New York*, 489 F. 2d 377 (C.A. 2, 1973); *Smith* v. *Carey*, 473 F. Supp. 268, n. 2 (S. D. N.Y.,1979). In this same respect we note that this issue, and its variants, are still open to debate, Cf. *Moore* v. *City of East Cleveland*, 431 U.S. 494, 521 (1977) Burger, C.J., dissenting); *Construction Aggregates Corp.* v. *Rivera de Vicenty*, 573 F. 2d 86(C.A.1,1978, at fn. 6. Nevertheless, whatever may be the view of the Second Circuit, or however debatable the point may appear to be, the greater weight of present authority, and indeed the more binding authority on this Court, has clearly not required it. This District Court in interpreting numerous Supreme Court cases[6] has never required it. See: e.g. *Morales* v. *Vega*, 461 F. Supp. 656 (D.P.R. 1978), *Gonzalez* v. *Calero*, 440 F. Supp. 989 n. 3 (D.P.R., 1977); *Inmobiliaria Borinquen* v. *Garcia Santiago*, 295 F. Supp. 203, 206 (D.P.R., 1969).

Moreover, it must be remembered that the claim here is one of a deprivation of a constitutionally protected interest, i.e., the right to continue in public employment without political harassment of any kind, *Branti* v. *Finkel*, 48 U.S.L.W. 4331 (March 3, 1980). In the extensive argument advanced by the Defendants on this point they have not specifically set out exactly what administrative remedies are available and what specific relief may be had via administrative adjudication. Assuming that the Defendants are

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[5] This has been primarily a rule limited to the Second Circuit.

[6] *Ellis* v. *Dyson*, 421 U.S. 426 (1975); *Steffel* v. *Thompson*, 415 U.S. 452 (1975); *Carter* v. *Stanton*, 405 U.S. 669 (1972); *Wilwording* v. *Swenson*, 404 U.S. 249 (1971); *King* v. *Smith*, 392 U.S. 309 (1968); *Houghton* v. *Shafer*, 392 U.S. 639 (1968); *Damico* v. *California*, 389 U.S. 416 (1967); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Monroe* v. *Pape*, 365 U.S. 167 (1961).

referring to the Public Service Personnel Act of Puerto Rico, 3 L.P.R.A. s1301-1431, nowhere does it appear that administrative review would fully encompass this constitutional claim set out by the Plaintiff, see L.P.R.A. s1381-1398, see esp. s1394. Indeed the oppsite is true. *Pierson Muller I* v. *Feijoo,* 106 D.P.R., 838, 847 (1978) (On Reconsideration). Not only will the constitutional claim go unaddressed but it appears that no compensatory or declaratory award is available, other than the payment of salaries not received, see 3 L.P.R.A. s1397.

Because of the dubious character of the administrative relief with respect to the thrust of what is Plaintiff's claim herein, our reliance on this Court's past rulings is sound, and indeed the line of reasoning adopted by the Second Circuit on this point is not altogether applicable. Cf. *Plano* v. *Barker,* 504 F. 2d. 595, 598 (C.A. 2, 1974); see also *Cordova* v. *Reed,* 521 F. 2d 621 (C.A. 2, 1975). For these reasons Defendants' invocation of the administrative exhaustion doctrine is inapplicable and it would, therefore, not preclude our examination of the merits. The request to strike affirmative defenses 8, 9, 11 and 14 is GRANTED.

In conclusion: the Motion to Dismiss and/or Summary Judgment is DENIED. The Motion to Strike affirmative defenses is DENIED with respect to affirmative defenses 1, 2, 3, 5, 7, 10 and 13; it is GRANTED with respect to affirmative defenses 8, 9, 11 and 14.

All pending discovery matters are hereby referred to the United States Magistrate.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 21st day of April, 1980.

/s/ JUAN R. TORRUELLA
Juan R. Torruella
U.S. District Court Judge

APPENDIX C

Statutory Provisions Involved

31 L.P.R.A. §5298 (1968)

§5298 Actions which prescribe in one year

The following prescribe in one year:

1. Actions to recover or retain possession.
2. Actions to demand civil liability for grave insults or calumny, and for obligations arising from fault or negligence mentioned in section 5141 of this title, from the time the assigned person had knowledge thereof.

42 U.S.C. §1983 (1976)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX D

An Example Of The Letter Of Appointment Sent To Respondents

Dear _____:

I would like to inform you that I have reassigned you to position number 0099, of Secondary School Director IV in the Naranjito School District. This reassignment and promotion will be effective on September 1, 1976 and will be of a substitute nature with a monthly salary of $890.00.

Your contract is subject to renewal at the end of each academic year subject to recommendation of your immediate supervisor and of the needs of the service. You will be considered for assignment to a probationary or tenured position to which I am reassigning you according to the established norms.

I wish you success in this new endeavor.

APPENDIX E

An Example Of The Notice Of Non-Reappointment Received By Respondents

Dear _____:

As you know, the appointment to the position you now occupy expires with the termination of the present school year.

While we appreciate your collaboration we remind you that you are correspondingly reinstated to the position in which you have tenure in the system. To this effect our Personnel Division is proceeding to reinstate you to position number 0126 which is elementary school teacher in the Loiza School District effective August 8, 1977.

APPENDIX F

An Example Of The Letter Sent By Respondents To Petitioners

Dear Mr. Secretary:

I have received a communication from the Department in your name dated May 31, 1977, signed by Mr. Julio Cintron Lopez, Director of the Personnel Division. I am not in agreement with your decision.

To this effect I have remitted copy of the same to the Puerto Rico Teachers Association so that said organization may instruct its legal division to take necessary action.

Meanwhile I shall comply with the Order sent by you.

Opposition

Office-Supreme Court, U.S.
FILED
SEP 4 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-249

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CARLOS CHARDON, Individually, *et al.*, *Petitioners*,

v.

RAFAEL RIVERA FERNANDEZ, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, for limitations purposes, a cause of action under 42 U.S.C. §1983 alleging a politically discriminatory demotion of a teacher-administrator accrues when the demotion becomes effective, where the complaint's allegations directly and unambiguously challenge the demotion, and that demotion constitutes the injury complained of.

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IN THE

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OCTOBER TERM, 1981

No. 81-249

CARLOS CHARDON, Individually, *et al.*, *Petitioners*,

v.

RAFAEL RIVERA FERNANDEZ, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Respondents in these 36 cases were all employed during the 1976-77 school year as non-tenured administrators in the Commonwealth of Puerto Rico Department of Education. They were all active members of the Popular Democratic Party which was in power in Puerto Rico in the fall of 1976. A gubernatorial election was held in that year, in which a candidate of the New Progressive Party was elected. In March 1977 the new governor appointed Petitioners Carlos Chardón as Secretary of Education and Oscar Ramos as Assistant Secretary of Public Education in charge of personnel. Sometime between June 3 and June 17, 1977, each Respondent received a letter advising him or her that "the appointment to the position you now occupy expires with the termination of the present school year." The letters received by 33 of the Respondents indicated that they would be reinstated to the tenured positions they had previously held as teachers or lower level administrators. The other three who had not previously held tenured positions were told that their employment with the Department would cease.

Each of the 36 letters indicated a date, between June 30 and August 8, when the action would take effect. The Respondents answered, most within a few days of receiving the notice, by a letter to Petitioners stating that "I am not in agreement with your decision . . . To this effect I have remitted copy of the same to the Puerto Rico Teachers Association so that said organization may instruct its Legal Division to take the necessary action." The demotions and terminations all occurred as scheduled.

On June 19, 1978, one José Ortiz Rivera, another Department of Education employee who had suffered similar treatment, filed suit in the United States District Court for the District of Puerto Rico under 42 U.S.C. §1983. Ortiz Rivera claimed that the action had been taken because of his political affiliation, in violation of the First and Fourteenth Amendments to the United States Constitution. He purported to represent a class of over 100 persons, including these 36 Respondents. Class certification was denied, and each of these Respondents then filed a separate complaint, making essentially the same substantive allegations directly challenging their demotions. See Complaint in Appendix, allegations 8, 12, 13, 15, 17 and 18.[1] The district court dismissed all 36 complaints on the ground that they were barred by the one-year statute of limitations applicable to section 1983 actions under 31 L.P.R.A. § 5298 (2).[2]

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[1] The complaints for all 36 cases in all pertinent parts are virtually identical except for the name of the position occupied by each particular plaintiff for the 1976-77 school year contained in allegation 8. The complaint filed in the case of Plaintiff Respondent Rafael Rivera Fernández is herein included in the Appendix.

[2] We call the Court's attention to the fact that Respondents' complaints have considerable substantive merit. The §1983 actions of 55 other plaintiffs not dismissed as time-barred have gone to consolidated jury trial with a resulting finding of liability for political discrimination. *Soto* v. *Chardón*, 514 F.Supp. 339 (D.C.P.R. 1981)

On appeal to the United States Court of Appeals for the First Circuit, the parties agreed that section 5298 is the applicable statute of limitations, and that the present actions were commenced, for limitations purposes, on June 19, 1978, when Ortiz Rivera filed his complaint. The First Circuit, focusing on the allegations in Respondents' complaints which unambiguously challenged their demotions, held that Respondents' causes of action were not time-barred because they had accrued on the dates their demotions became effective. The judgments of the district courts were vacated and the cases were remanded for further proceedings.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The First Circuit's Decision is Consistent With This Court's Decision in *Delaware State College v. Ricks.*

Petitioners argue that the First Circuit's decision in these cases does not follow this Court's recent limitations decision in *Delaware State College* v. *Ricks,* 449 U.S. ____, 101 S.Ct. 498 (1980). However, Respondents submit that this is clearly not so. After receiving the parties' briefs and Respondents' Supplemental Argument, and after addressing *Ricks* in oral argument, the First Circuit thoroughly analyzed *Ricks,* properly distinguished its facts from those of these cases, and correctly concluded that this Court's approach in *Ricks* warranted a decision in favor of Respondents.

In *Ricks* v. *Delaware State College,* 605 F.2d 710 (3rd Cir. 1979), *reversed* 449 U.S. ____, 101 S.Ct. 498 (1980), the Third Circuit held that the Title VII and §1981 causes of action of a professor, allegedly discriminated against on national origin grounds when he was denied tenure, accrued when his one-year "terminal" contract subsequently expired, and not when he was officially denied

tenure. That court, for policy reasons, adopted what it called a "bright line guide" for courts and victims of discrimination *even though the only discriminatory act alleged by the plaintiff in Ricks was the denial of tenure itself.* This Court, after granting certiorari, reversed the Third Circuit in *Ricks,* rejected its "bright line guide" and held, *based on plaintiff's own allegations,* that his causes of action accrued when he was officially denied tenure and so notified.

For the following reasons, it is clear that the First Circuit followed *Ricks* in concluding that in these cases Respondents' §1983 causes of action accrued when their demotions became effective.

A. In *Ricks,* this Court, focusing on Title VII's "unlawful employment practice" language, emphasized that the only discriminatory act alleged was the college's denial of tenure to the plaintiff. Plaintiff in *Ricks* did not allege that "the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who had also been denied tenure." *Id.* at ____. *In marked contrast, as Respondents' complaints clearly demonstrate, Respondents challenge as unlawful not their notices of prospective demotions, but the demotions themselves.* See Complaint in Appendix, allegations 8, 12, 13, 15, 17 and 18. This was expressly noted and relied upon by the First Circuit when it held that Petitioners' "unlawful act" occurred at the time Respondents' demotions became effective. For limitations purposes, therefore, Respondents' challenge to their actual demotions was correctly treated by the First Circuit as the equivalent of the challenge to the denial of tenure to plaintiff in *Ricks.*

B. The First Circuit also observed that the denial of tenure in *Ricks* which began the running of the relevant

statute of limitations was far more *official, formal* and *final* than the notices of prospective demotions in these cases. In *Ricks,* this Court emphasized that a faculty tenure committee had previously recommended that plaintiff not receive tenure, and after reconsideration, had adhered to that recommendation. Thereafter, the faculty senate voted to support the tenure committee's recommendation. Still later, the college's board of trustees formally voted to deny tenure to plaintiff. According to this Court, only when the board of trustees subsequently wrote plaintiff that he would be offered a one-year "terminal" contract because he had been denied tenure did his causes of action accrue for limitation purposes.

In these cases, however, as Respondents' complaints show, Respondents received only one letter each notifying them of their prospective demotions. Realistically, the First Circuit held, these letters could not be treated the same as the final letter to the *Ricks* plaintiff from the college's board of trustees. The letter in *Ricks* was sent *16 months* after the tenure committee's initial adverse recommendation, *four months* after that committee's adverse reconsideration, *three months* after the faculty senate vote, and *three months* after the board of trustees formally voted to deny plaintiff tenure.

C. In *Ricks,* the plaintiff was incontestably injured when he was denied tenure by the board of trustees. Shortly thereafter, when he was notified of this decision, his causes of action accrued. In these cases, though, as the First Circuit recognized, Respondents were not injured when they received their letters. According to the allegations in Respondents' complaints, Respondents were injured only when they were in fact demoted. Until that time, nothing as a practical matter happened to them. Injury to them was only speculative.

The First Circuit put it this way:

> No actual harm [was] done until the threatened action [was] consummated. Until then, the act which is the central focus of [Respondents'] claim remain[ed] incomplete. Such was not the situation in *Ricks*, where the denial of tenure was itself the completed act being challenged.

Consequently, the First Circuit followed *Ricks* in concluding that Respondents' §1983 causes of action could only accrue when they were injured in fact between June 30, 1977 and August 8, 1977.

D. The First Circuit's decision reflects its understanding that the thrust of *Ricks* is this Court's rejection of the Third Circuit's policy justifications for going beyond the allegations in employment discrimination complaints. *Ricks* serves notice that it is the allegations in employment discrimination complaints which will govern for accrual purposes. In this respect, *Ricks* is a narrow decision. This Court itself emphasized the limited scope of its decision in *Ricks* when it said:

> Complaints that employment termination resulted from discrimination can present widely varying circumstances. In this case the only alleged discriminatory act is the denial of tenure sought by a college professor with the termination of employment not occurring until a later date. The application of the general principles discussed herein necessarily must be made on a case-by-case basis. *Id.* at ____ n.9.

Here, too, the First Circuit's decision is narrow, focusing as it did on the allegations in Respondents' complaints and the unique fact situations posed by those complaints. As the First Circuit stated, "[Respondents'] quarrel is with their demotions and discharges — not with the notices themselves . . ."

Consequently, in attending strictly to the allegations in Respondents' complaints and in inquiring carefully into the fact situations thereby presented, the First Circuit's decision in these cases complied with the requirements of *Ricks* and is consistent with it.

II. The First Circuit's Decision Does Not Conflict with Decisions of the Fourth and Ninth Circuits.

Petitioners are simply incorrect when they argue that the First Circuit's decision is in direct conflict with *Bireline* v. *Seagondollar*, 567 F.2d 260 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979) and *Jackson* v. *Hayakawa*, 605 F.2d 1121 (9th Cir. 1979), *cert. denied*, 445 U.S. 952 (1980). First, both *Bireline* and *Jackson*, unlike the First Circuit's decision, were decided *before Ricks*. Second, *Bireline* contains no analysis whatever on the accrual issue and thus has little or no value as precedent. And third, not only is *Jackson* not an accrual case, but the Ninth Circuit's accrual rule appears in reality to be the opposite of what Petitioners say it is.

It is true that in *Bireline* the Fourth Circuit affirmed a District Court's dismissal of a §1983 action as time-barred on the ground that the cause of action accrued when the terminated plaintiff received her termination notice. However, it is significant that both the District Court and Fourth Circuit erroneously described the issue of whether plaintiff's cause of action accrued as one of *fact* instead of properly treating it as one of *law*. This led the Fourth Circuit to defer to the District Court's finding instead of analyzing the legal issue independently. Second, there was no discussion of policy or citation of any authority whatever in support of the Fourth Circuit's conclusion. In fact, *Bireline* is so questionable as a sound accrual decision that the Ninth Circuit, *in the very case relied on by Petitioners*, recently read it as a *tolling case*.

Jackson v. *Hayakawa*, 605 F.2d 1121, 1127 (9th Cir. 1979). With these shortcomings, therefore, *Bireline* cannot and should not serve as a basis on which to grant certiorari.

As to the supposed conflict between the First Circuit's decision and the Ninth Circuit's decision in *Jackson*, the Petitioners' argument is, with all respect, disingenuous. *Jackson* involved the applicability of a three-year limitations period to a §1983 action brought by a psychology instructor who was not rehired by a state college. Plaintiff there had received notice of termination of his employment and thereafter pursued an administrative grievance procedure. However, accrual of his cause of action and its relation to receipt of his termination notice *were never discussed*. Instead, the Ninth Circuit dealt solely with the *tolling* issue! In no sensible way can *Jackson* be read as setting forth an accrual rule inconsistent with that of the First Circuit in these cases.

In fact, the accrual rule in the Ninth Circuit appears to be consistent with the First Circuit's decision. In *N.L.R.B.* v. *California School of Professional Psychology*, 583 F.2d 1099 (9th Cir. 1978), the Ninth Circuit was confronted with an unfair labor practice complaint filed with the National Labor Relations Board more than six months *after* the teacher was formally notified of the school's decision not to rehire him, but *within* six months of the time the teacher's teaching contract expired. The court held that the six month period began with the school's formal notice to the teacher that he would not be rehired and therefore dismissed the complaint.

However, the Ninth Circuit explicitly recognized the difference between an unfair labor practice case and a civil rights or civil liberties case. It rejected the Board's accrual argument based on an analogy to Title VII dis-

crimination cases where "the limitations period does not begin running until the contested job is otherwise filled." *Id.* at 1102. The court responded to this argument:

> But this analogy fails. Title VII is intended to prevent the hiring of non-minorities undertaken as discrimination against minorities. Accordingly, the alleged unlawful employment practice is not complete until the position is filled and no longer available to the claimant. *Id.*

Consequently, not only do *Jackson* and *California School* not support Petitioners' "direct conflict" argument, but, by recognizing that employment discrimination cases merit a different accrual standard, *California School* actually demonstrates that the Ninth Circuit's employment discrimination accrual rule is consistent with the First Circuit's decision in these cases.

III. The Accrual Issue Addressed in the First Circuit's Decision Does Not at this Time Warrant this Court's Exercise of Its Certiorari Jurisdiction.

As noted earlier, the First Circuit's decision is neither inconsistent with this Court's decision in *Ricks*, nor is it in conflict with decisions of the Fourth and Ninth Circuits. Thus, the supposed inconsistencies and conflicts that Petitioners refer to do not warrant this Court's exercise of its certiorari jurisdiction.

There are additional reasons that this Court should not now exercise its certiorari jurisdiction. First, Respondents agree — as they must — with Petitioners when the latter point to the important interests served by statutes of limitation. However, Petitioners ignore *Ricks's* emphasis on deciding employment discrimination limitations cases on a *case by case* basis with an eye on the allegations presented in a plaintiff's complaint. In this respect, *Ricks* and the First Circuit's decision are narrow cases tailored to their respective factual allegations.

Further, Petitioners' assertion of the need for uniformity in connection with §1983 limitations issues is somewhat misplaced here. For one thing, as observed earlier, limitations issues, especially after *Ricks*, should be decided on a case by case basis. For another, the true uniformity issue arises because Congress has not enacted a generally applicable statute of limitations for §1983 causes of action. Rather, analogous state statutes of limitation are applicable pursuant to 42 U.S.C. §1988. *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980). There can be little uniformity where the statute of limitations applicable to a §1983 cause of action depends upon the state in which the action is brought.

Finally, it is most important that this Court give the other Circuit Courts of Appeal sufficient time to deal with and assimilate Ricks. Ricks was decided in December of 1980, with the First Circuit's decision announced in May 1981. Given the passage of less than a year's time, and in the absence of a conflict between *Ricks* and the First Circuit's decision, this Court should allow the other Circuits the opportunity both to re-examine their own accrual decisions in light of *Ricks* and to apply *Ricks* to the different kinds of fact patterns that will inevitably emerge.

CONCLUSION

For all these reasons, Respondents respectfully urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil Action No: 79-165

Trial by Jury

RAFAEL RIVERA FERNANDEZ,

Plaintiff,

vs.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

COMPLAINT

TO THE HONORABLE COURT:

NOW COMES the Plaintiff and through his undersigned attorneys very respectfully claims, alleges, and requests as follows:

1. This is an action for declaratory and injunctive relief, back pay, damages, and other relief arising under the First and Fourteenth Amendments to the United States Constitution; Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. §1983; 28 U.S.C. § 2201, 2202; 18 L.P.R.A. § 249 (e), 18 L.P.R.A. 211, and 18 L.P.R.A. 214, *et seq.*

2. The jurisdiction of this Court is founded upon 28 U.S.C. §1331 and 1343 (3) and (4). The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

3. The Plaintiff in this action is a resident of Puerto Rico and employee of the Department of Public Education of the Commonwealth of Puerto Rico (referred to hereinafter as "the Department").

4. The Defendants in this action are:

(a) Carlos Chardón, who is, and at all times herein relevant was, the Secretary of Public Education of Puerto Rico. In this capacity, he has ultimate responsibility for the supervision and administration of the Department, including determination of the employment status of the Plaintiff. Defendant Chardón is sued in his individual and official capacities.

(b) Oscar Ramos, who is, and at all time herein relevant was, the Assistant Secretary of Public Education in Charge of Personnel of Puerto Rico. In this capacity, he has responsibility for the supervision and administration of personnel matters in the Department, including the determination of the employment status of the Plaintiff. Defendant Ramos is sued in his individual and official capacities.

5. On November 2, 1976, Puerto Rico held a gubernatorial election. In this election, the candidate of the Popular Democratic Party (referred to hereinafter as the "PDP") was incumbent Governor Rafael Hernández Colón. Former Governor Hernández Colón was defeated by Governor Carlos Romero Barceló, who was the candidate of the New Progressive Party (referred to hereinafter as the "NPP"). Governor Romero Barceló took office on January 2, 1977.

6. Governor Romero Barceló appointed Mr. Herman Sulsona as Secretary of Public Education, and Sulsona, in turn, appointed defendant Ramos as Assistant Secretary of Public Education in Charge of Personnel. Both Sulsona and Defendant Ramos assumed their positions on or about January 3, 1977. Both Sulsona and Defendant Ramos are members and active in the affairs of the NPP.

7. On or about March 13, 1977, Mr. Sulsona resigned as Secretary of Public Education, and Governor Romero Bar-

celó appointed Defendant Chardón as his successor. Defendant Chardón assumed the position of Secretary of Public Education on or about March 31, 1977. Defendant Chardón is a member and active in the affairs of the NPP.

8. The Plaintiff mentioned in the caption of this complaint was employed by the Department of Education during the 1976-77 school year, without permanent status; in a locally and/or federally funded position as Intermediate School Director IV. He had been promoted to such position, on the basis of his merits, from a lower position in which he did have and enjoy permanent status within the meaning of 18 L.P.R.A. 211 and was protected by 18 L.P.R.A. 214, *et seq.* Plaintiff was demoted to his previous position, such demotion to take effect at the beginning of the 1977-78 school year. This last action on the part of Defendants also deprived Plaintiff of his constitutional rights and, in particular, constituted a violation of his rights under the First and Fourteenth Amendments of the Constitution of the United States. The aforementioned position in which Plaintiff was employed during the 1976-77 school year involved functions of school administration. It was not a policy-making position, and Plaintiff did not participate in the formulation of policies relating to the operation of the Department. He had to follow policies formulated at the Department's level.

9. Plaintiff is, and at all times herein relevant was, member and active in the affairs of the PDP or political parties other than the NPP. On information and belief, the defendants are, and at all times herein relevant were, aware of Plaintiff's political association with its party, even if they did not know him personally.

10. On or about June, 1977, Plaintiff received a letter, signed by Julio Cintrón López, Director of the Personnel Division of the Department, removing him from his position, effective at the beginning of the 1977-78 school year, and reassigning him to his previous position in the Department. A copy of the aforesaid letter is attached to this complaint as

Attachment A,* and made a part hereof. Plaintiff's permanent position, to which he was assigned as per the corresponding letter, is lower in rank and compensation than the non permanent he held until then, and, therefore, his reassignment constitutes a demotion. On or about June 1977, Plaintiff wrote a letter to Defendant Chardón, in which he objects his removal from his position and announces that he is taking the necessary steps towards the corresponding legal action. A copy of such letter is attached to this complaint as *Attachment B*,** and made a part hereof.

11. The letter received by Plaintiff sets forth no reason for his removal from the non permanent position he held and there was no legitimate reason for such removal. No notice, hearing, nor any other form of due process was awarded to plaintiff.

12. At the beginning of the 1977-78 school year, Plaintiff was actually removed from the non permanent position in which he was employed during the 1976-77 school year, and demoted to his permanent position in the Department. As of the date of this complaint, he is serving in the latter position.

13. Substantially all of the persons who were employed during the 1976-77 school year without permanent status in locally and/or federally funded positions as Executive Directors, Directors, Assistant Directors, General Supervisors, Zone Supervisors, Superintendents, Assistant Superintendents, and Curriculum Technicians and who were members and/or active in the affairs of the PDP or political parties other than the NPP were removed from their positions at the end of the 1976-77 school year or the beginning of the 1977-78 school year; and substantially all of the persons who were employed during the 1976-77 school year without permanent status in the aforesaid positions and who were not members and/or active in the affairs of the PDP or political parties other than the NPP were not removed.

14. The supervisory position in which Plaintiff was employed during the 1976-77 school year has been filled for the 1977-78 school year.

15. Plaintiff alleges that the Defendants removed him from his supervisory position at the beginning of the 1977-78 school year and demoted him to his previous position solely because of his political association with the PDP or parties other than the NPP, and that he would not have been removed and demoted but for such association.

16. Plaintiff alleges that the aforesaid action by the Defendants constitutes a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. He also alleges that said action is contrary to and contravenes the rights acquired by him under the provisions of 18 L.P.R.A. 214 *et seq.* He further avers that as career public servant (empleado publico de carrera) he had the legitimate expectation to remain in the position to which he had been promoted (and from which he was demoted by Defendants) and that he could not be removed or demoted from that position except for cause.

17. The Defendants knew, or reasonably should have known, that removing Plaintiff from his supervisory position and demoting him to his previous position because of his political association with the PDP or parties other than the NPP was a violation of his rights under the First and Fourteenth Amendments to the United States Constitution. The Defendants acted maliciously, willfully, and in wanton and reckless disregard of Plaintiff's constitutional rights when they took the aforesaid action, in violation of Plaintiff's civil rights, as provided in Section 1983, 42 U.S.C.A.

18. The action of the Defendant in removing Plaintiff as stated above constituted a violation of his rights under the First and Fourteenth Amendments to the United States Constitution; constituted a violation of his civil rights as provided in Section 1983, 42 U.S.C.A., and constituted a violation of his rights under the laws of Puerto Rico, specifically (in addition to § 214 mentioned in paragraph 16 under Section 249 (a) and (e), of Title 18, L.P.R.A.

WHEREFORE, the Plaintiff respectfully requests from this Court that it:

1. Declare that the Defendants:

   (a) in removing the Plaintiff from the position in which he was employed during the 1976-77 school year, violated his rights under the First and Fourteenth Amendments to the United States Constitution and under Section 1983 of 42 U.S.C.A.; and also violated his rights under Sections 249 (a) and (e) and 214, *et seq.* of Title 18 L.P.R.A.

2. Order that Defendants:

   (a) reinstate Plaintiff to the position in which he was employed during the 1976-77 school year and from which he was dismissed or demoted in violation of his rights under the statutes mentioned in the complaint.

   (b) pay to Plaintiff full back pay for the period from the date of his removal or demotion from the positions in which he was employed during the 1976-77 school year until the date of his reinstatement to that or other substantially equivalent position, including prejudgment interests, less any pay received by him from the Department during the period in question.

   (c) pay to the Plaintiff all damages approximately resulting from defendants' wrongful actions;

   (d) pay to the Plaintiff punitive damages in the amount of $50,000.00; and

   (e) be enjoined permanently from removing any person from a non-policy making position with the Department because of such person's political association.

3. Award to the Plaintiff:

   (a) costs and reasonable attorneys' fees; and

   (b) such other and further relief as this Court shall find to be just and proper.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 2nd day of January, 1979.

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* See Petitioners' Brief For Translation of Attachment A page 69a.

** See Petitioners' Brief For Translation of Attachment B page 71a.

Petitioner's Reply Brief

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No. 81-249

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CARLOS CHARDON, Individually, *et al.*, *Petitioners*,

v.

RAFAEL RIVERA FERNANDEZ, *et al.*, *Respondents*.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

PETITIONERS' REPLY BRIEF

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On Petition for Writ of Certiorari
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PETITIONERS' REPLY BRIEF

Pursuant to Rule 22.5, petitioners submit this Reply to Respondents' Brief in Opposition to the Petition for Writ of Certiorari.

I. Respondents Fail To Reconcile The Decision Below With This Court's Decision In *Delaware State College* v. *Ricks*.

Respondents are incorrect in their contention that the decision of the court below can be reconciled with this Court's recent decision in *Delaware State College* v. *Ricks*, 449 U.S. 250, 101 S.Ct. 498 (1980).

This Court found in *Ricks* that the focus in determining the point of accrual of a cause of action for employment discrimination must be upon the unlawful act from which plaintiff seeks relief. Respondents attempt to avoid the clear effect of the *Ricks* holding by arguing that the allegedly unlawful acts complained of in the instant cases were not the "notices of prospective demotions, but the demotions themselves". Opposition at 4. Respondents

support this argument by referring to several allegations in their complaints. Opposition at 4, 1a-7a.

However, respondents place undue reliance on the mere words used in their District Court Complaints. It is not enough to point simply to the allegations that the respondents were "demoted"; it is instead necessary to analyze what actually occurred and how it occurred in order to determine what is the alleged wrong underlying respondents' causes of action. This history is discussed generally in the Petition at 2-3, 4-6. Critical to this analysis is the undisputed fact that each of the thirty-six respondents held a temporary, non-tenured position in the Department of Education to last one year unless renewed. Petition at 67a. Under Puerto Rican law none of these employees had any vested rights in his or her temporary position, nor any guarantee that such appointment would be renewed.[1] For an employee to remain in the position, reappointment was required. The complaints are grounded in the contention that failure to reappoint was made for political reasons — a subjective act. Thus it was the *decision not to reappoint* that caused the so-called "demotions"[2] and it is the non-reappoint-

[1] Section 1333(12) of Title 3 of the Laws of Puerto Rico, Annotated, provides:

> Persons appointed to positions of fixed duration shall have a transitory status. The duration of these appointments shall correspond to the period for which the position is created. Transitory appointments to permanent positions may be made as determined by regulations.

[2] Respondents have thus mischaracterized the decisions of non-reappointment as "demotions" and "discharges". The respondents were not demoted or discharged but rather were not reappointed to temporary appointments. Respondents' complaints admit that the administrative positions were non-permanent, "The Plaintiff mentioned in the caption of this complaint was employed by the Department of Education during the 1976-1977 school year, without per-

ment decision which is the act giving rise to a colorable claim under § 1983 as being allegedly discriminatory.

The foregoing analysis also makes clear that the act of non-reappointment in the instant cases is indistinguishable from the denial of tenure involved in *Ricks* as previously discussed in the Petition at 4-6. Thus, here, as in *Ricks,* the running of the statute of limitations should begin from the time of the allegedly discriminatory act or notice thereof to respondents, not from the time the results of that act became effective. Nothing in Respondents' Opposition establishes the contrary.

II. Respondents Have Not Shown An Absence Of Conflict Between The Decision Below And *Bireline* v. *Seagondollar* And *Jackson* v. *Hayakawa.*

The decision of the court below is clearly in conflict with *Bireline* v. *Seagondollar,* 567 F.2d 260 (4th Cir. 1977), *cert. denied,* 444 U.S. 842 (1979). The respondents' quarrel with the soundness of the Fourth Circuit's reasoning in *Bireline* does not establish the absence of a conflict.

The respondents' argument that *Jackson* v. *Hayakawa,* 605 F.2d 1121 (9th Cir. 1979), *cert. denied,* 445 U.S. 952 (1980) is simply a tolling case, ignores the crucial point that the tolling issue would never have arisen if the cause of action had accrued later than the plaintiff's receipt of notice. In any event, the Ninth Circuit found the plaintiff's cause of action time barred, focusing solely upon

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manent status." Opposition at 3a, ¶ 8; *See also* references in the complaints to the "non permanent position" and "persons . . . without permanent status". Opposition at 3a-4a, ¶¶ 10-13. Furthermore, the letter of appointment sent to respondents indicates that the supervisory positions were temporary in nature and "subject to renewal at the end of each academic year". Petition at 67a.

the date plaintiff received notice of the university's tenure decision. The court apparently regarded the plaintiff's last day of employment as so irrelevant that it is not even mentioned in the court's opinion. *Jackson* is thus in conflict with the opinion of the court below.

The respondents' reliance on *N.L.R.B.* v. *California School of Professional Psychology*, 583 F.2d 1099 (9th Cir. 1978) as authority that no conflict exists between *Jackson* and the opinion of the court below is clearly misplaced. In *California School* the court held that the plaintiff's action was barred by the six month limitations period for filing charges with the National Labor Relations Board. The court found that the alleged unfair labor practice — the failure to rehire the plaintiff because of union activities — occurred, if at all, when the plaintiff was formally notified by letter that he would not be rehired. 583 F.2d at 1101. In so holding the court specifically rejected the argument that the cause of action accrued when the plaintiff's current teaching contract expired and emphasized that the alleged unlawful act — the decision not to rehire — should not be confused with the date the plaintiff's teaching duties ceased. *Id.*

Thus, *California School* supports petitioners' position, not respondents'. In any case, petitioners respectfully submit that the actual holdings in *California School* and *Jackson*, where plaintiffs' actions were found time barred, are far better indications of the Ninth Circuits' accrual rule than the mere dicta from *California School* relied upon by the respondents.[3]

[3] The language quoted by the respondents originally appeared in *Gates* v. *Georgia-Pacific Corporation*, 492 F.2d 292, 294-95 (9th Cir. 1974), a case which held that the plaintiff's cause of action accrued when she was informed that she would not be hired by the defendant. The defendant in *Gates* argued that the rejected applicant's inter-

III. Prompt Resolution Of The Conflict Is Necessary To Protect The Important Interests Served By Statutes Of Limitations.

The respondents argue that the instant cases are not worthy of this Court's review because the accrual issue must be decided on a "case by case" basis. The simple response is that this is a "case" in which the holding of the court below conflicts with a decision of this Court and with those of other circuits. The issue of cause-of-action accrual is as ripe for review in this case as it was in *Ricks* when review was granted.

Furthermore, respondents have misunderstood, or mischaracterized, petitioners' suggestion that a uniform federal rule governing the accrual of § 1983 actions is desirable and appropriate. The petitioners have not asked this Court to announce a uniform limitations *period* to be applied to § 1983 and other civil rights actions. Rather, the petitioners seek resolution of conflicting rules of *accrual* in such actions.

The decision of the court below is a result of, and has exacerbated, the confusion surrounding the issue of accrual. Failure to resolve the conflicts between the decision of the court below and *Ricks, Bireline* and *Jackson,* as respondents urge this Court to do, will only perpetuate this confusion. Moreover, petitioners see no need for other circuits to assimilate *Ricks* and create yet more confusion. This issue is ripe for resolution now and should be resolved.

---

view date was the proper point of accrual. The court rejected that argument and held instead that the cause of action accrued when the plaintiff reapplied for the position and first learned it had been filled. Thus, seen in context, the *California School* language quoted by the respondents has an entirely different meaning than that implied by the respondents and indeed supports petitioners.

CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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